Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

YILI TSENG,

Petitioner,

v.

FLORIDA A & M UNIVERSITY,
FLORIDA A & M UNIVERSITY
BOARD OF TRUSTEES,

Respondents,

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is an employee's foreign accent a legitimate reason for adverse employment actions when a preponderance of evidence shows his accent has not interfered with his job performance and his performance actually surpassed other candidates'?

2. Is grant of summary judgment legitimate when lower courts violated several standards and laws set forth by this Court?

3. Does lower courts' blatant disregarding of evidence of Petitioner violate his right to sue and to give evidence under 42 U.S.C. § 1981 (a)?

4. Are judges of Court of Appeals authorized to create a new protected class for Title VII of the Civil Rights Act of 1964 to justify grant of summary judgment?

PARTIES TO THE PROCEEDING

Petitioner is Yili Tseng. He was Plaintiff in the District Court and appellant in the Court of Appeals.

Respondents are Florida A & M University, and the Board of Trustees of Florida A & M University. They were Defendants in the District Court and Appellees in the Court of Appeals.

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Petitioner respectfully petitions for a writ of certiorari to review the district court's granting summary judgment and the judgment of the Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the district court was entered on September 30, 2009. (App. B) The unreported opinion of the 11th Circuit (App. C) was entered on May 27, 2010.

JURISDICTION

The timely filed petition for rehearing en banc was denied on July 26, 2010 (App. D). The mandate judgment of 11th Circuit was entered on August 3, 2010 (App. E). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

I. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a):

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an

employee, because of such individual's race, color, religion, sex, or national origin.

II. 42 U.S.C. § 1981 (a):

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens....

STATEMENT OF THE CASE

Petitioner is an immigrant from Taiwan who received the highest degree possible in the United States, Ph.D. in Computer Engineering. Even with the Ph.D. degree and proved excellent job performance of four years, he was still repeatedly refused a tenure track assistant professor position while less qualified and even unqualified persons were hired by Respondents. Before Petitioner filed this case, a lawyer warned him "All Southern judges hate discrimination cases. They will try their best to dismiss your case." The proceedings of district court and 11th Circuit truthfully reflected that warning. Respondent craftily picked the fact of Petitioner's foreign accent as pretext Fueled by their aversion, despite Petitioner presented a preponderance of evidence from Respondents and State agencies to prove that the proffered reasons were not used in the recruiting process and that Petitioner's accent had not impaired his job performance, both courts blatantly disregarded all Petitioner's evidence without addressing at all and solely relied on the fact of Petitioner's accent to grant and affirm summary judgment in favor of Respondents. Both courts

seriously violated several standards and laws set forth by this Court regarding permission of past acts as evidence and summary judgment. Petitioner's right to give evidence under 42 U.S.C. § 1981 (a) was violated as well.

This Court's intervention is necessary as the questionable proceedings found in this case are not uncommon in many similar cases. United States has more than 40 million first-generation immigrants in 2010 with about one million new immigrants admitted each year. Undoubtedly most of them have foreign accents. If an immigrant like Petitioner could not escape being discriminated on his accent even after he attained the highest degree possible and achieved excellent job performance, , no other immigrant can be immune from being discriminated. All discriminatory employers need to do is use accents as pretexts. All courts will protect them from punishment. Actually the negative impact already appeared. When Petitioner searched Internet for information for this petition, he found some web sites already cited the ruling from 11th Circuit as "Professors' foreign accents are not discrimination." If this case is not rectified, the erroneous precedent will profoundly impact numerous current and future immigrants with foreign accents because any discriminatory employer can well use foreign accents as a legitimate pretext to deprive any immigrant of a job despite their capability and performance. That would virtually void Title VII as well.

I. Proceedings Below

This employment discrimination case based on national origin commenced on February 27, 2008. "Second report and recommendation"(App. A) issued

by district court's Magistrate Judge on August 5, 2009 recommended granting summary judgment in favor of Respondents by noting "Plaintiff has not shown that the reasons proffered for this difficult decision were pretextual The decision was not based upon Plaintiff's national origin." Petitioner timely filed objections to the report by indicating a preponderance of evidence presented by Petitioner to prove proffered reasons pretextual was ignored even without being addressed at all Chief Judge of district court claimed he did a de novo review of the report and granted summary judgment for Respondents on September 30, 2009 by concluding "Plaintiff has not produced sufficient evidence to create a genuine issue of material fact regarding the veracity of Defendants' stated reasons for promoting Chi instead of Plaintiff Nor has Plaintiff produced any evidence that his national origin was the real reason...." (App. B) The truths were that Chief Judge, like Magistrate Judge, blatanty ignored plenty of evidence favorable to Petitioner without addressing at all. Their proceedings and practices truthfully reflected their hostility toward discrimination lawsuits

Petitioner appealed at 11th Circuit in November 2009 To Petitioner's surprise, 11th Circuit's antipathy toward discrimination cases is no less than district court. Petitioner filed his initial brief which emphasized all evidence disregarded by district court on November 28, 2009 Respondents responded Petitioner filed a reply brief in response to Respondents' brief with major revisions and reorganizations of theories on evidence, but it was returned because of non-compliance. Petitioner was requested by the clerk to file a corrected brief along with "Motion to file a corrected reply brief." Petitioner filed both on March 5, 2009. 11th Circuit

granted the motion to file the corrected reply brief (App. F) and affirmed district court's granting of summary judgment (App. C) on the same day, May 27, 2010 by concluding "Tseng's evidence does not show that FAMU(Florida A & M University) 's proffered reasons were false. Even if it did, Tseng offers nothing to suggest that a discriminatory animus against Taiwanese .... was the real motivation for FAMU's decision." It is very unlikely that the panel could grant a motion, review the corrected reply brief, and gather together to make a sound per curiam decision all in one day. As Petitioner's reply brief contained major revisions of theories, apparently they were plainly ignored by 11th Circuit. Petitioner timely filed motion for rehearing en banc to present all evidence disregarded without addressing by the panel. Nevertheless it was denied on July 26, 2010 with the note "no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc." (App. D) Like district court, 11th Circuit solely relied on the fact of Petitioner's accent and ignored a preponderance of evidence favorable to Petitioner without even addressing at all. Both courts violated several standards and laws set forth by this Court in ruling adopting of evidence and summary judgment. 11th Circuit even unprofessionally created a new protected class for Title VII to justify their opinion. "The fact that Tseng was passed over in favor of another foreign national, who also was not a native speaker of English, hardly supports a conclusion that FAMU acted out of animus toward foreigners or foreign accents." (App. C) Different nationalities are distinct protected classes under Title VII, but there is no such class "foreigner". That shows 11th Circuit is close to frivolous. Petitioner's right to sue and to give

evidence was seriously violated. All ignored evidence without addressing is described in following sections. It does not take legal professionals to recognize their relevance and importance.

II. Factual Background

A. Petitioner

1. Qualifications and Job Performance

Note no other persons who received positions denied to Petitioner had equivalent job performance

- Petitioner is an immigrant from Taiwan who received the Ph.D. degree in Computer Engineering from University of Central Florida in December 2000.
- Petitioner taught at FAMU from 2001 to 2005 as a visiting assistant professor. Petitioner was nominated for university-wide Teacher of the Year Award (App. G) by students in 2002 after his first year of teaching at FAMU. Edward Jones, department chairman, and Ken Riggs, chair of 2006 faculty search committee, wrote recommendation letters for Petitioner for that nomination. (App. H & I) Those undoubtedly demonstrate Petitioner's superior teaching performance and that his accent was not interfering with his teaching performance from the beginning.
- Students directed by Petitioner won three awards in three major science competitions in July 2002, November 2002, and February 2003.
- Students directed by Petitioner published one research paper in May 2004.
- In 2005, Petitioner collected 15 letters of support from former FAMU students after he lost his

position at FAMU and had no influence on students. All of them indicated Petitioner was an excellent and caring professor. (App. J & K)

- Most significantly, Petitioner was the only applicant receiving a perfect score, 5 points, for teaching performance among 24 applicants in the ranking for 2006 faculty search. (App. L) That certainly proves Petitioner's superior teaching performance. If Petitioner's accent impaired his teaching, how could he have received a perfect score for teaching from a faculty search committee consisting of five members?

2. Disparate Treatments

Petitioner applied for a tenure track position in 2001, 2003, 2005, and 2006 and was repeatedly denied. However, the evidence was disregarded by both courts by the allegation that they were not alleged to EEOC. It is erroneous because Petitioner alleged the disparate treatments in his complaints to EEOC, district court, and 11th Circuit.

- Petitioner applied in 2001 and received only a temporary visiting position. Another visiting position was offered to an African American who was not qualified for being without Ph.D. degree. In 2002, his position was secretly converted to tenure track position while he was still without Ph.D. degree, namely ineligible.
- In 2003, Petitioner applied again. The position was offered to an Eastern Indian who has heavy Indian accent and who had no better qualification and performance than Petitioner's.
- In 2005, Petitioner applied again. The position was offered to a Chinese, Hongmei Chi, who has serious English deficiency which will be described later, much less college teaching experience, and

no better qualification and performance than Petitioner.

- In 2006, the position was re-advertised as Chi did not receive the tenure track position in 2005 for some unknown reason. Petitioner applied. Even the total scores of ranking for Petitioner and Chi were both 9 points while Petitioner had a perfect score for teaching, only Chi was interviewed and eventually received the position.

B. Proffered Reasons Are Pretextual

The reasons failing to hire were proffered by Department Chair, Jones, (App. M) as "Chi was recommended because (1) she worked well and collaborated with **all** faculty members (2) Additionally, Chi's communication skills **surpassed** those of Tseng. It is important that our faculty have a command of **spoken English**, especially in technical fields" (Emphasis added) Note in Bouvier's A Law Dictionary, pretext is defined as "The reasons assigned to justify an act, which have only the appearance of truth, and which are without foundation; or which if true are not the true reasons for such act." The reasons proffered by FAMU matched this definition perfectly as they are somewhat factual while they were not the true reasons as they were not used to deny Petitioner. Evidence described in following sections will prove that. Fueled by their aversion toward discrimination cases, both courts easily accepted proffered reasons as true reasons after defense counsels presented Petitioner's depositions which were crafted to reflect only the facts without considering applicability and were completed occupied with them thereafter. The fact is evidenced by that almost all the evidence to be

described was not even mentioned by any opinion of either court. Both courts not only weighed the evidence of Petitioner, which is a function of jury, but also disregarded all evidence in favor of nonmoving party, Petitioner. Their proceedings violated the following standards set forth by this Court.

> "The standard for judgment as a matter of law under Rule 50 mirrors the standard for summary judgment under Rule 56. Thus, the court must review all of the evidence in the record, cf., *e.g.*, *Matsushita Elec Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587, drawing all reasonable inferences in favor of the nonmoving party, but making no credibility determinations or weighing any evidence, *e.g.*, *Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545, 554—555. The latter functions, along with the drawing of legitimate inferences from the facts, are for the jury, not the court. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe.... In holding that the record contained insufficient evidence to sustain the jury's verdict, the Fifth Circuit misapplied the standard of review dictated by Rule 50. The court disregarded evidence favorable to Reeves–the evidence supporting his prima facie case and undermining respondent's nondiscriminatory explanation–and failed to draw all reasonable inferences in his favor." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000)

C. Disregarded Evidence

All the following evidence was ignored by both courts without even addressing.

1. The Reasons Were Not Used by Search Committee

The proffered reasons were not used to deny Petitioner. The recruiting process is described in FAMU's 2nd response to FCHR (App. N) as "Dr. Jones (department chair) was not a member of the search committee in 2005 or 2006 ..... The search committee conducted interviews and reference checks and made a recommendation to the department chair, who then made a recommendation to the Dean. The Dean made a recommendation to the Provost and Vice President for Academic Affairs, who has the authority to extend offers of employment to faculty members." Petitioner was rejected by search committee without interview. Therefore, Petitioner was solely denied by criterions applied by search committee and Department Chair was not involved in his denial. Riggs, Chair of search committee, wrote in his report to Department Chair "All applicants for each position were rated on teaching and research. The top scorers were then ordered by their fit with the department's needs and goals by committee members in consultation." (App. O) As confirmed by the 2006 ranking table (App. L), only teaching, research, and fit were used to rank all applicants. Unmistakably, collaboration and English criterions were never used by the search committee to evaluate applicants or ever mentioned in Riggs' report. How is it possible that Petitioner was rejected by criterions which were never adopted by the Search Committee? Let alone the proffered reasons were from Jones who did not involve in denial of Petitioner. Jones also has credibility problem as described in next section. Both

courts plainly did not consider or address this evidence and Jones credibility. They violated the following standard set by this Court: "But in ruling on a motion for summary judgment, the nonmoving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in [that party's] favor.' (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, (1986))." *Hunt v. Cromartie*, 526 US. 541 (1999)

2. Credibility of Department Chairman

Department Chairman, Jones, turns out to be the decisionmaker in this case and was found lying in at least three occasions. Those facts are very important to the factfinders. But both courts blatantly disregarded them without addressing. Two incidents are repeated here. First, in previous section, evidence shows FAMU stated that Department Chairman was not involved in selection and merely passed the recommendation from search committee to the Dean. However, the letter from search committee chair to recommend Chi to department chair (App. O) was dated July 7, 2006. But the recommendation form from Department Chairman to the Dean was dated July 3, 2006. The timestamp of Dean's Office shows July 5, 2006. (App. R) Combined with that proffered reasons were from Jones, it proves that Jones was the decisionmaker of the discrimination and he lied about the truth.

Second, during discovery, Petitioner acquired a letter from Jones to University justifying that Chi did not receive the tenure track position because of a university directive that tenure track positions are not to be offered to persons without permanent residency. After request for admission, FAMU

admitted there was no such directive. If Jones lied in his letter to University, why would not he lie in a bigger trouble?

The notorious credibility of Jones definitely is relevant to the credibility of his proffered reasons. Again, both courts blatantly disregarded it without addressing. They violated the review standards for summary judgment once more.

3. Why the Proffered Reasons Are Not Precise If They are Truths?

The proffered reasons should have been accurate as Respondents knew the real reasons to deny Petitioner and the reasons were prepared with the help of FAMU's attorneys '[T]he employer is in the best position to put forth the actual reason for its decision." See *Reeves* If the proffered reasons are true, why FAMU could not give precise scale and quantity in their reasons? Evidence shows that Chi only collaborated with 3 out of 15 faculty members. That is a huge discrepancy from FAMU's allegation "Chi collaborated with **all** faculty members." The significant discrepancies are another indication that proffered reasons are false Both courts merely disregarded Petitioner's inquiry and favorably interpreted Respondents' allegation as "Chi collaborated with more faculty members than Petitioner did " That interpretation is not same as Respondents' allegation. Both courts violated the following standard. "[T]he court must .... drawing all reasonable inferences in favor of the nonmoving party.... it must disregard all evidence favorable to the moving party that the jury is not required to believe...." Id.

Petitioner also showed that Chi has serious English deficiency by presenting three of her e-mails (App. P & Q). It is impossible that a person with serious English deficiency can speak better spoken English. In first e-mail, Chi wrote "Dr. Tseng's wife couldnot [sic] to reach [sic] this morning and asked me to tell you that Dr. Tseng is hoopitalized [sic] last night..... Dr. Tseng's classes have to be concealed [sic] for this week. I already put a sign for today..... I will put a sign in classroom for today." In second e-mail, she typed "I am sorry that I didnot [sic] call you or send your [sic] email [sic] to let you know where the projector is. when [sic] I finished class, Doug's office is close [sic] so I put projector in Dr Evans [sic] office It wont [sic] happen again." In third e-mail, Chi wrote "Could you tell me where your projector [sic]? Room 104 or Room 313?" The fact that Chi made those serious mistakes even in short e-mails like those is sufficient to prove there are factual disputes in the allegation that Chi's English surpassed Petitioner's. But district court merely ignored this factual dispute without addressing. 11th Circuit noted "In response, the defendants note a number of similar grammatical and typographical errors in Tseng's own court filings." (App. C) The truth is that defense counsels presented only one falsified mistake. 11th Circuit violated another standard set forth by this Court: "In any event, it was error in this case for the District Court to resolve the disputed fact of motivation at the summary judgment stage. Cf. *ibid* ('Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions'). See *Hunt v. Cromartie*,

4. Job Performance instead of Accents Is at Issue

EEOC regulates accent discrimination as a violation of national origin discrimination by stating: "An employer may not base a decision on an employee's foreign accent unless the accent materially interferes with job performance.' An adverse employment decision may be predicated upon an individual's accent when--but only when--it interferes materially with job performance. *Fragante v. City & County of Honolulu*, 888 F.2d 591 (9th Cir 1989) One case is highly similar to that of Petitioner. 9th Circuit fairly considered job performance which was blatantly ignored in this case as quoted.

> "However, there is no evidence in the summary judgment record that Raad's accent ever interfered with her performance while she served either as a substitute teacher or as a temporary full-time teacher ..... Here, the summary judgment record contains evidence that Raad's accent did not impair her performance as a teacher (and therefore was not job-related), including recommendations written by her graduate school instructors, requests for her as a substitute by other teachers employed by the District, and the District's own continued employment of her as a substitute Based on this evidence, it would be reasonable for a finder of fact to infer that the District used her accent as a pretext to deny her a full-time position because of her national origin....." See *Raad v. Fairbanks*. 323 F.3d 1185 (9th Cir. 2003)

Respondents did not present any evidence that Petitioner's accent impaired his job performance. What FAMU presented were an opinion from FCHR

investigator that Petitioner's "accent" and speech patterns might make it difficult for an average listener to understand him in a "classroom setting" and an out of context answer in Petitioner's deposition that his English was "sometimes difficult to understand." First, FCHR investigator only interviewed Petitioner for half an hour and had never sit in any of Petitioner's classes. How could she determine that average students had difficulty understanding Petitioner? Actually Petitioner used lots of slides with plenty of carefully selected illustrations and examples to overcome the rare possibility that few students may not be used to Petitioner's accent. That strategy worked excellent and that is how Petitioner accomplished his teaching excellence despite his accent. It was reflected in two of the letters of support. One states "Dr. Tseng's knowledge and command of the subject area was superb and despite his accent he was able to communicate the material well to the entire class." Another states "Although he taught a challenging subject. Dr. Tseng became a master at presenting the material in way that was understandable and appealing, all the while overcoming the language barrier between him and his students." Petitioner explained that strategy and positive result in the tricky question in his depositions "Is your English sometimes difficult to understand?" Both courts took only the out of context part and totally disregard the part how Petitioner overcame the rare occasions. Those are not equivalent to interference with job performance. Otherwise how could Petitioner be nominated for Teacher of the Year Award by students and why would Jones and Riggs write recommendation letter for him? How could students directed by Petitioner win major awards and publish

a research paper? How could 15 former students write letters of support for Petitioner after he lost his position? Most significantly, how could the search committee issue a perfect score for Petitioner's teaching performance if all five members knew his accent impaired his teaching, especially when they all knew him for four years? Besides, why would FAMU continuously hire Petitioner for four years if his accent was interfering with his teaching? Again, both courts violated the standard by making inferences favorable to moving party instead of nonmoving party.

5. Discriminatory Animus/Direct Evidence

Both courts erroneously requested Petitioner to prove discriminative animus.

> "As the Supreme Court recently reaffirmed, a disparate treatment plaintiff can survive summary judgment without producing any evidence of discrimination beyond that constituting his prima facie case, if that evidence raises a genuine issue of material fact regarding the truth of the employer's proffered reasons. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000)," See *Chuang v. University of California, Davis*, 225 F.3d 1115 (9th Cir. 2000)

Before both courts erred in this aspect, both erred in excluding past discriminative acts citing that Petitioner did not allege past acts in his complaint to EEOC. It is untrue as Petitioner did allege the disparate treatments in his complaints to EEOC, district court, and 11th Circuit. Both courts simply ignored the fact and restricted this case to the incident in 2006. Both violated the standard cited below.

> "The existence of past acts and the employee's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed. Nor does the statute bar an employee from using the prior acts as background evidence to support a timely claim. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U S. 101(2002), Accord *United Air Lines, Inc. v. Evans*, 431 U S. 553 (1977)

Even both courts applied the wrong standards, Petitioner still presented a preponderance of evidence as direct evidence or evidence of Respondents' discriminatory animus. Likewise, it was simply disregarded by both courts without addressing. No students had ever complained about his accent or English capability to Petitioner while he was with FAMU. Department Chair had not shown any concern about Petitioner's English capability in the first three years. All of sudden, at the end of third year, April 2004, Jones started putting negative comments about Petitioner's English in his annual evaluations. Most significantly, Jones criticized Petitioner's English at a faculty search committee meeting in 2005 recruitment. Jones' actions were beyond reasonable concerns for the following reasons: 1. It never takes long to figure out that one person's English is interfering with his duty. But it took Jones three years to realize the "fact." As the visiting position is renewed annually, Jones could have refused to renew the contract if he found Petitioner's English was impairing his teaching. 2 Petitioner's excellent teaching performance ruled out that his English was interfering with his teaching. Jones knew about all teaching accomplishments of

Petitioner as Petitioner reported all of them during annual evaluations. That Jones wrote a recommendation for letter for Petitioner's nomination of Teacher of the Year Award is another proof. Jones well knew Petitioner's English was not interfering with his teaching performance. 3. Jones, Respondents, district court, and 11th Circuit all indicated that concern for English is related to teaching performance. However, Petitioner is the only applicant who received a perfect score for teaching ranking in 2006 recruitment. If Petitioner's English really impaired his teaching, all five members of search committee would know because they had known Petitioner for four years then. Faculty Search Committee could well have given Petitioner a lower score for that. But the perfect score from five members of search committee says otherwise. Apparently they did not agree with Jones. Another serious violation is that Jones should not have participated in any search committee meeting according to FAMU's regulations. Jones not only illegally participated but also criticized Petitioner's English capability publicly in the committee meeting which decided Petitioner's employment in 2005. Two members of 2005 search committee, Riggs and Clement Allen, also served on 2006 search committee. Undoubtedly, the message "Do not hire Dr. Tseng" was passed from 2005 on. It is absolutely beyond reasonable concern and truths, especially when Jones knew that Petitioner's English never impaired his job performance. The facts constitute direct evidence. However, 11th Circuit, like district court, simply ignored the factual disputes and evidence without addressing and ruled "Appellant had not presented any direct evidence." That simply violated procedural justice. Even if both courts did not rule

Jones' actions as direct evidence, they are sufficient to constitute discriminative animus. However, both courts blatantly disregarded the evidence

Recall 11th Circuit's opinion: " The fact that Tseng was passed over in favor of another foreign national, who also was not a native speaker of English, hardly supports a conclusion that FAMU acted out of animus toward foreigners or foreign accents. Because Tseng failed to identify any "blatant" remarks or actions "whose intent could be nothing other than to discriminate," the district court correctly found that he had not shown direct evidence of discrimination." Two serious flaws exist with the unpersuasive opinion: 1. Discriminatory animus is not restricted to blatant remarks only. Any action using pretext instead of job performance is discriminatory animus. Jones' using Petitioner's English which did not impair his job performance to deny Petitioner is definitely discriminatory animus, especially when five members of search committee disagreed with him 2. 11th Circuit's opinion about foreigner paradoxically supports another ignored inquiry of Petitioner. That Jones hired one Indian and one Chinese who has heavy accents and English issues shows he was not really concerned about English issue. But he used English as a reason to deny Petitioner. That further proves Jones' discriminatory animus toward Petitioner because he applied the English criterion only to Petitioner, especially when he knew Petitioner's English did not impair his performance.

REASONS FOR GRANTING THE WRIT

I. This Case Presents National Importance and Will Profoundly Impact the Employment Rights of Numerous Current and Future Immigrants with Foreign Accents

United States has more than 40 million first-generation immigrants in 2010 with about one million new immigrants admitted each year. Undoubtedly, Most of them have foreign accents. If this Court did not effectively rectify the subjectivities about foreign accents and procedural injustice of lower courts like district court and 11th Circuit in this case, it will open a loophole for Title VII of the Civil Rights Act of 1964. All immigrants with foreign accents are warranted to discrimination because of their accents, no matter how hard and well they work and what advanced degree they attained All discriminatory employers need to do is use English or accent as a proffered reason. All courts will protect them from being punished with their aversion and frivolous practice toward discrimination lawsuits.

II. This Case Presents an Exceptionally Important Question Which the Lower Courts Are Divided

Some lower courts impartially considered job performance in ruling employment discrimination cases involving foreign accents. "A foreign accent that does not interfere with a Title VII claimant's ability to perform duties of the position he has been denied is not a legitimate justification for adverse employment decisions." *Carino v. University of Oklahoma Board of Regents*, 750 F.2d 815, 819 (10th Cir 1984); *Raad v. Fairbanks*,; *Fragante*, supra, 888 F.2d at 596 "An adverse employment decision may be predicated upon an individual's accent when—but only when—it interferes materially with job

performance." *Altman v. New York City Dep't of Educ.*, 2007 WL 1290599, at *5 (S.D.N.Y., May 1, 2007); *Tekula v. Bayport-Blue Point School Dist.*, 295 F Supp.2d 224, 230 (E.D.N.Y. 2003) "However, there is no evidence in the summary judgment record that Raad's accent ever interfered with her performance" *Raad v. Fairbanks*, 323 F.3d 1185 (9th Cir. 2003)

Contrarily, some lower courts solely relied on the subjectivity that it is not discrimination to require workers to speak English with local accents without consideration of job performance at all. Their common practice is ignoring evidence favorable to plaintiffs like in this case. "[R]equiring that a professor speak the native tongue in order to convey his ideas is not any form of discrimination, invidious or otherwise." *Jiminez v. Mary Washington College*, 57 F.3d 369, 380 (4th Cir 1995) ("[R]eferences to audience difficulty in understanding [plaintiff professor] may reasonably be interpreted as expressing a concern about his ability to communicate to students rather than discriminatory animus based on ethnicity or accent."). *Bina v. Providence College*, 39 F 3d 21, 26 (1st Cir. 1994)

A court should never solely rely on fact of foreign accents without considering overall job performance like district court and 11th Circuit did in this case. This Court should set forth the standards to ensure job performance is always fairly considered in all employment discrimination cases

III. This Case is An Effortless Case for This Court to Make Profound Impact

Petitioner's case is highly similar to that of *Raad*. But the outcomes and procedural justice served are disparate. All evidence of Petitioner similar to that of

Raad was totally disregarded by district court and 11th Circuit. Both lower courts blatantly violated several standards and laws set forth by this Court by simply disregarding all evidence of Petitioner because of their aversion toward discrimination cases. It is not uncommon in many similar cases. This Court needs to set forth new standards regarding foreign accents to effectively protect numerous immigrants with foreign accents and avert the wrong attitudes of some lower courts by rectifying this case. Luckily it will be effortless for this Court to do that because the errors made by both courts are so apparent and straightforward. Nonetheless, the impact is going to be so profound considering the sheer number of immigrants with foreign accents.

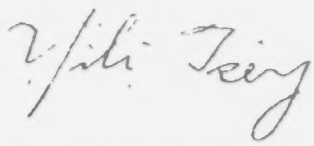
CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the Court to grant the petition for writ of certiorari.

Dated October 24, 2010

Revised to comply on December 27, 2010

Respectfully submitted,



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Pro se Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

YILI TSENG
Plaintiff,

vs. CASE NO 4:08-CV-91-SPM-WCS

FLORIDA A & M UNIVERSITY and
FLORIDA A & M UNIVERSITY BOARD
OF TRUSTEES,
Defendants

_____/

SECOND REPORT AND RECOMMENDATION

This employment discrimination case was filed by Plaintiff, *pro se*, on February 27, 2008 Doc. 1. Since that time, Defendants' motion to dismiss, doc. 19, was granted, docs. 29 and 57, and Plaintiff's amendment to the complaint was dismissed.[1] After discovery closed, Defendants filed a motion for summary judgment, doc. 48, supported by a statement of material facts, doc. 49. Plaintiff was advised of his obligation to respond to the motion, doc. 51, and his response was filed, doc. 60, along with Plaintiff's statement of facts, doc. 61.

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[1] That amendment had sought to add a request for punitive damages, but was denied because punitive damages may not be obtained from a state agency pursuant to 42 U S C § 1981(b)(1) *See* docs 29, 57.

After review of those materials, the parties were directed to supplement the evidence because it appeared from these documents that Plaintiff might not have been "qualified" for the position sought. Doc. 62. That *sua sponte* order led to another brief discovery period, and the parties were given leave to file a supplemental memorandum of law "limited to the issue of whether Plaintiff was qualified pursuant to the University's requirements for a tenured track position." Doc 66. Defendants filed supplemental materials, doc. 69, and a supplemental memorandum of law, doc. 71, which is erroneously titled on the docket as a "response." Plaintiff also filed a supplemental memorandum Doc. 72

The Complaint, doc. 1

Plaintiff alleged that Defendants discriminated against him on the basis of his national origin when Plaintiff was not hired for a tenured position at Florida A & M University . (hereinafter FAMU). Doc. 1, pp 3, 5-6 Plaintiff is a citizen of Taiwan and contends he had the "required English fluency to teach in a university" and sought employment in the Department of Computer and Information Sciences (hereinafter CIS) *Id.*, at 5. Plaintiff alleges that Dr. Hongmei Chi, who is Chinese, was offered the position instead of him *Id.*, at 6.

Plaintiff filed a charge of discrimination jointly with the Florida Commission on Human Relations (FCHR) and the Equal Employment Opportunity Commission (EEOC) alleging that FAMU discriminated against him due to his national origin, Taiwanese, in July of 2006 when Plaintiff "applied for

a tenure track professor position "[2] Doc. 1, p. 9. Plaintiff claimed he had better qualifications than Dr Chi, a Chinese female, who was hired instead of Plaintiff. *Id.* The EEOC issued Plaintiff a notice of right to sue letter on or about November 27, 2007, doc. 1, p. 10, which was received by Plaintiff on November 30, 2007. *Id* , at 12. This case was initiated on February 27, 2008

Motion for summary judgment, doc. 48

Defendants contend that "Plaintiff's claim of national origin discrimination is completely unfounded." Doc. 48, p. 5. Defendants also argue that Plaintiff has no evidence of any unlawful bias against him by "any person at all with the ability to have affected" the decision to hire Dr. Chi. *Id.*, at 6, 7 Defendants assert that the panel which made the hiring decision ranked Dr Chi "higher than Plaintiff." *Id.*, at 6. Defendants argue that even if Chi's lower salary costs, or the fact that she and the Department Chair wrote articles together for professional publications, played a part in the decision to hire Chi, these considerations have nothing to do with Plaintiff's national origin. *Id.*, at 7. Defendants contend that Dr Chi was hired because she "collaborated with other faculty members better" and had "better English skills " *Id.*, at 7-8.

Legal standards governing a motion for summary judgment

On a motion for summary judgment Defendants initially have the burden to demonstrate an absence of evidence to support the nonmoving party's case. Celotex Corporation v. Catrett, 477 U.S

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[2] Thus, the only job opportunity at issue here is the 2006 selection of Dr Chi over Plaintiff

317, 322-23, 106 S Ct 2548, 2553-54, 91 L. Ed 2d 265 (1986). If they do so, the burden shifts to Plaintiff to come forward with evidentiary material demonstrating a genuine issue of material fact for trial. *Id.* An issue of fact is "material" if it could affect the outcome of the case. Hickson Corp. v. Northern Crossarm Co., Inc., 357 F.3d 1256, 1259 (11th Cir 2004) (citations omitted) Plaintiff must show more than the existence of a "metaphysical doubt" regarding the material facts, Matsushita Electric Industrial Co LTD. v. Zenith Radio Corporation 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed 2d 538 (1986), and a "scintilla" of evidence is insufficient. The court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Hickson Corp., 357 F.3d at 1260, *quoting* Anderson v Liberty Lobby, 477 U.S. 242, 252, 106 S. Ct. 2505, 2505, 91 L. Ed 2d 202 (1986). All reasonable inferences must be resolved in the light most favorable to the nonmoving party Watkins v. Ford Motor Co., 190 F.3d 1213, 1216 (11th Cir. 1999)

"Rule 56(e) . . requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial.' " Owen v. Wille, 117 F.3d 1235, 1236 (11th Cir. 1997), *cert. denied* 522 U.S. 1126 (1998), *quoting* Celotex, 477 U.S. at 324, 106 S. Ct at 2553 (quoting Fed. R. Civ. P. 56(c), (e)). The nonmoving party need not produce evidence in a form that would be admissible as Rule 56(e) permits opposition to a summary judgment motion by any of the kinds of evidentiary materials

listed in Rule 56(c). Owen v. Wille, 117 F.3d at 1236, Celotex, 477 U.S. at 324, 106 S. Ct. at 2553.

The relevant Rule 56(c) evidence

Plaintiff was employed by FAMU in August of 2001 as a "visiting" professor. Doc. 49, p. 1; Plaintiff's deposition, p. 10 (doc. 48-4, p. 19); Plaintiff's deposition, p. 51 (doc. 48-4, p. 101).[3] Plaintiff was provided an annual contract for nine months of employment during his employment with FAMU. Plaintiff's deposition, p. 52 (doc. 48-4, p. 103). As each contact expired, FAMU could choose to continue with Plaintiff's employment for another year or not issue a new contract. Plaintiff's deposition, p. 52 (doc. 48-4, p.103). Faculty hired with "visiting contracts" have "no expectation that employment will be extended beyond the ending date of the contract." Plaintiff's Ex. 12 (doc. 60-3, p. 7). Pursuant to University policy, "visiting contracts" could only be renewed only for a maximum of four years." Plaintiff's deposition, pp. 107-108 (doc. 48-5, pp. 43, 45); Plaintiff's Ex. 10 (doc. 60-2, p. 80). Plaintiff's employment with FAMU ended on May 6, 2005. Doc. 49, p. 1; Plaintiff's deposition, p. 11 (doc. 48-4, p. 21); Plaintiff's Ex. 12 (doc. 60-3, p. 7).

There is some dispute, however, as to whether this was a firm policy. In the supplemental evidence submitted by Defendants, it appears that some employees could be repeatedly hired for a maximum of six years. Defendant's Supp. (Doc. 69-4, p. 1, doc.

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[3] All references to exhibits are first designated by the electronic docket reference, followed in parenthesis by reference to the paper copy, page number, and title as may be appropriate. Both citations are referenced as a pro se litigant will not have access to the court's electronic docket, but only upon the first occurrence of that reference.

69-3, p. 1). It is unclear whether this provision is applicable for a "visiting professor" or some other type of "temporary" position as the policy falls within the Revised Guidelines for H-1 B Visa Petition. Defendant's Supp (Doc. 69-4, p. 1). Pursuant to those Guidelines, which were in effect as of August of 2004 (during the relevant period of Plaintiff's contract renewal), foreign nationals with an H1-B visa could be employed in specialty occupations (such as computer science), and could fill a position on a temporary basis for up to six years Defendant's Supp. (Doc. 69-4, p. 1; doc. 69-3, p 1). Under the policy then, the University could hire a qualified person in a specialty occupation, which Plaintiff occupied but even though the "position may be a permanent one, the prospective employee under H-1 B visa must be filling it temporarily, meaning for a period of up to a maximum of six years." Defendant's Supp. (Doc. 69-4, p 1) This dispute, however, is not one of material fact since the cessation of Plaintiff's employment in 2005 is not an issue in this case

Another matter that is unclear is that the policy provides that "[t]enure-track and tenured faculty may be accorded H-1 B status" yet it also simultaneously states "H-1 B status is for temporary workers." *Id.* This evidence indicates that a foreign national such as Plaintiff *could* have been hired into a tenure track position as it was not precluded by University policy Ultimately, this is not a dispute of material fact either.

In 2005, Plaintiff's salary was approximately $68,000 per year while Dr. Chi's salary was approximately $55,000.00. Doc. 49, p. 2; Plaintiff's deposition; pp 29-30 (doc. 48-4, pp 58-59). At one

time Plaintiff suspected that salary played a significant role in the decision to hire Dr. Chi in 2006, although there is no evidence to support that suspicion Plaintiff's deposition, pp. 28-29, 126-127 (doc 48-4, pp 55, 57, doc. 48-5, pp. 81-83) The salary for the tenure-track position 19033000 was advertised at $65,000, however Plaintiff's Ex. 26 (doc 60-4, p 9). The position had been "held by another Visiting Assistant Professor who earned $68,661 " *Id.*

Plaintiff's resume and employment application for position 1903300, assistant professor, submitted on or about April 21, 2006, reveals that Plaintiff earned his Bachelor's Degree in Taiwan in 1985. Plaintiff's resume, Defendants' Ex. 3 (doc. 48-6, pp 2 4) He earned a Masters of Science degree in Engineering Science from the University of Florida in 1990. *Id.*, at 2. Between August, 1990 through December of 2000, Plaintiff earned another Masters of Science degree and his Ph.D. in Computer Engineering from the University of Central Florida *Id* Plaintiff's cover letter attached to the application states:

> In addition to teaching, I am interested in research as well. Definitely I will write for grants to support my research Despite the heavy teaching load, I still published two papers on internationally recognized journals and one paper at ICPADS'02, and submitted to papers to different journals in the past three years

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[4] Plaintiff's initial suspicion was that Dr Chi was hired instead of him because of the salary difference and not due to discrimination Plaintiff's deposition pp 129 173 (doc 48-5 pp 87, 175)

Defendants' Ex. 3 (doc. 48-6, p 5). Plaintiff's resume stated that Plaintiff had taught two graduate courses and eight undergraduate courses at FAMU. Defendants' Ex 3 (doc. 48-6, p. 6). Plaintiff listed two years of having been a research assistant, and showed five publications (not including the dissertation), two of which were listed as submitted. Defendants' Ex. 3 (doc. 48-6, p. 7)

Dr. Chi's application is also in evidence. Defendants' Ex. 3 (doc 48-6, pp 13- 19). Dr. Chi earned a Bachelor of Science degree in Statistics from Nankai University, a Master of Science degree in Computer Science from Dalian University of Technology, a Master of Science degree in Statistics from the University of Louisiana at Lafayette, and earned her Ph D in Computer Science from Florida State University in 2004. Defendants' Ex. 3 (doc. 48-6, p. 18). Dr. Chi listed six years as a research assistant at Florida State University, and another year as a research assistant at the University of Louisiana at Lafayette *Id.* Dr. Chi also taught various semesters at Florida State University between Fall of 1998 and Spring, 2004, and taught courses in the computer science department for four years at the Beijing University of Chemical and Technology. Plaintiff's Ex. 44 (doc. 60-5, p. 18). Dr. Chi lists sixteen publications, three of which were shown as "submitted," and several appear to be conference publications. Defendants' Ex. 3 (doc. 48-6, p. 19). All of those publications are collaborations between Dr. Chi and other persons. *Id.*

The process of selecting a professor at FAMU is that a committee reviews applications, conducts

interviews, and then makes a recommendation. Doc. 49, p. 2; Plaintiff's deposition, pp. 30-32 (doc. 48-4, pp. 59-63). The Department Chair reviews the recommendation, which is either approved or rejected, but the Chair is not able to substitute or recommend another person. Doc. 49, p. 2, Plaintiff's deposition, pp. 30-32, 38-39 (doc. 48-4, pp. 59-63, 75-77). The Chair makes a recommendation to the Dean, who then presents the recommendation to the Provost. Doc. 49, p. 2; Plaintiff's deposition, pp. 30-32 (doc. 48-4, pp. 59-63).

Four faculty positions were advertised for 2005 at FAMU within the CIS Department. Plaintiff's Ex. 18 (doc 60-3, p 24). The Committee in 2005 was comprised of Clement Allen, Marion Harmon, Deidre Evans, Ken Riggs, and Malcolm Barnes. Plaintiff's Ex. 18 (doc. 60-3, p. 23) Plaintiff and others applied, but following the interview process in 2005, no one was hired for the positions.[5] Doc. 49, p. 2; Plaintiff's deposition, p. 35 (doc. 48-4, p. 69); Plaintiff's Ex. 10 (doc 60-2, p. 83). Although the positions were not filled, Dr. Chi was ranked higher than Plaintiff. Doc. 49, p 2; Plaintiff's deposition, p. 35 (doc. 48-4, p. 69). Plaintiff was ranked "second of eight people behind Dr. Chi " Plaintiff's deposition, pp. 35, 36 (doc. 48-4, pp. 69-71); Plaintiff's Ex. 24 (doc. 60-4, p. 6). Dr. Chi was recommended by the search committee for the position, but the recommendation was not approved by the Dean. Plaintiff's deposition, p 35 (doc. 48-4, p. 69); Plaintiff's Ex. 10 (doc. 60-2, p. 83). The advertised

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[5] As noted previously, the 2005 position was not alleged in the charge of discrimination to the EEOC and is not at issue in this case *See* n.2.

positions remained vacant during the 2005-2006 academic year Plaintiff's Ex. 10 (doc. 60-2, p. 83).

On November 21, 2005, Dr. Jones wrote a letter to Dr. Greenleaf, the Human Resources Administrator at FAMU. Plaintiff's Ex. 26 (doc. 60-4, p. 9). The letter sought to justify Dr. Chi's salary for position 19033000. *Id.* Dr. Jones explained that Dr. Chi was recommended at that time for the position at the advertised salary of $65,000 per year, and said that the salary "reflected Dr. Chi's qualifications and were comparable to those of the visiting faculty member previously in position 19033000." *Id.*

Plaintiff presented evidence that after the recommendation was made to hire Dr. Chi in 2005, "the University issued a directive that tenure track appointments would no longer be made to persons who are not U.S. citizens or permanent residents." Plaintiff's Ex. 26 (doc. 60-4, p. 9). That evidence comes from a letter written by Dr. Jones, Chairman, to Dr. Greenleaf, the Human Resources Administrator. *Id.* The letter states that because of that "directive, the CIS Department revised the recommendation, but only to the extent of changing the appointment status from Tenure-Earning to Visiting" Professor.[6] Plaintiff's Ex. 26 (doc. 60-4, p. 9).

Plaintiff did not apply for permanent residency in the United States until June of 2006. Plaintiff's deposition, p. 229 (doc. 48-5, p. 287). Plaintiff received permanent residency in March of 2008. *Id.*.

Position 19033000 became available for the 2006 year, the one at issue in this case The process

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[6] It was that evidence that led to the supplemental discovery period Doc 62

was the same; although Plaintiff was not interviewed for the position and he received a lower ranking than in the previous year. Plaintiff's deposition, p. 93 (doc. 48-5, p. 15). The committee in 2006 was comprised of Bobby Granville, Ken Riggs, Clement Allen, Christy Chatmon, and Richard Marcus. Plaintiff's Ex. 18 (doc. 60- 3, p. 18). Professors Riggs and Allen were the only two members of the committee who also served on the 2005 selection committee. *Id.* Only the top five ranked candidates were interviewed for the position, and Plaintiff was not interviewed. Plaintiff's Ex. 10, p. 6 (doc. 60-2, p. 84). As noted above, in the prior 2005 hiring year, Dr. Chi was ranked first, and Plaintiff was ranked second. Plaintiff's deposition, p. 93 (doc. 48-5, p. 15). After the review process for the 2006 position concluded, Dr. Chi was offered the job at the salary rate of $60,000.00, to be employed from August, 2006, through May, 2007. Plaintiff's Ex. 7 (doc. 60-2, p. 7). The faculty employment contract for position
19033000 indicates it was for a non-tenure earning position, and appointment status was listed as "regular." *Id.*

A memorandum was issued on Friday, July 7, 2006, from Ken Riggs and Clement Allen, to Dr. Jones, Chair, recommending that Dr Chi be "offered the position of Assistant Professor of CIS," which was listed on the memorandum as position 17663. Plaintiff's Ex. 19 (doc. 60-3, p. 26).[7] The formal

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[7] The document recommended that Fenglien Lee be offered an associate professor position 19033000 Based on other evidence presented, this position number appears to be a mistake as the contract offered shows position number 19033000 instead. *Cf.*

Recommendation for Faculty Employment was dated July 3, 2006, and references position 19033000 with Dr. Hongmei Chi as the named employee. Plaintiffs' Ex. 20 (doc. 60-4, p.1). The recommendation lists the appointment type as "regular," and shows the rank as "Asst. Professor" "not eligible for Tenure." *Id.* The period of employment was from August 8, 2006, through May 7, 2007. *Id.* Dr. Edward Jones signed the recommendation as Area Chairperson on July 3, 2006, and it was signed by Henry Williams, Division Director, on August 3, 2006. *Id.*

Plaintiff submitted a copy of the letter written by Dr. Jones to Interim Dean Ralph Turner, for the College of Arts & Sciences, which was dated, July 3, 2006. Plaintiffs Ex. 21 (doc. 60-4, p. 2). The letter indicates, contrary to the Recommendation for Faculty Employment, that Dr. Chi was being recommended "for a tenure-track appointment to position 19033000 at the rank of Assistant Professor at the 9-month salary of $65,000, to begin August 7, 2006." *Id.* Dr. Jones recommended "that Dr. Chi be awarded one year towards tenure, based on her performance as a visiting faculty[8] in the department." *Id.* The letter ended by noting that "Dr. Chi's background in mathematics, statistics bioinformatics, and computer simulation will complement existing faculty strengths." *Id.*

Plaintiff's Ex. 7 (doc. 60-1) and Plaintiff's Ex. 20 (doc. 60-4, p. 1).

[8] Dr. Chi was a "Visiting Assistant Professor for the 2004-2006 academic years . . ." Plaintiff's Ex. 21 (doc. 60-4, p. 2). The letter noted that during that time, her research efforts "intersected those of other CIS faculty members and has resulted in over a dozen publications and three research proposals." *Id.*

Edward L. Jones, the Chair of CIS, submitted an affidavit in support of the summary judgment motion. Mr. Jones has served as Chair of the Department since August, 2001, and been employed by the University as an Associate Professor since 1998. Doc. 48-2, p. 1 (hereafter "Jones Affidavit"). In both 2005 and 2006, recommendations were provided from a search committee to Mr. Jones for a tenure track position as either an Assistant or Associate Professor in the CIS Department Jones Affidavit, p. 1. Plaintiff was one of the applicants considered by the Search Committee *Id.* Mr Jones agreed with the recommendation of Dr Chi for the 2006 position based on her qualifications *Id.* Dr Jones testified that at "no time" during the hiring process was he "motivated by the national origin of [Plaintiff], or any other applicant for the position " *Id.*, *see also* Plaintiff's Ex. 22 (doc. 60-4, p. 3).

Bobby Granville, an Associate Professor in the CIS Department, served on the Search Committee in 2006, the year at issue in this case. Doc. 48-3, p. 1 (hereafter "Granville Affidavit"). He acknowledges that Plaintiff was an applicant considered in the process of selecting a tenured professor *Id.* Professor Granville avers that his decision as to who the committee should recommend was not motivated by Plaintiff's national origin, nor was any other applicant's national origin a consideration. *Id.* There was never any "discussion of national origin during the course of the deliberations and discussions of the search committee." *Id.* Dr. Chi was recommended for the position based upon her qualifications. *Id.*

Defendants have pointed to statements made in Plaintiff's deposition that Plaintiff is unable to

identify anyone involved in the selection process who had discriminatory motives or a bias Doc. 49, p. 2; Plaintiff's deposition, pp 32, 39 (doc 48-4, pp. 63, 77). Plaintiff did not articulate any reason to believe the Provost, Dr. Debra Austin, was biased against him due to his national origin Doc 49, p 2, Plaintiff's deposition, p. 38 (doc 48-4, p. 75). When Plaintiff was specifically asked in his deposition what information he had that would lead him to believe Provost Austin was motivated by his national origin, Plaintiff could not present any. Plaintiff's deposition, pp. 37-38 (doc 48- 4, pp 73-75). Plaintiff only mentioned that in December of 2005 the Provost explained to him why he was not selected for the position and, while doing so, "reminded" Plaintiff that he might "be in violation of the immigration law."[9] Plaintiff's deposition, p 34 (doc 48-4, p. 67). Plaintiff said the Provost mentioned his "working visa"[10] to him and contends the provost made the

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[9] In a letter to the Provost dated October 31, 2005, Plaintiff explained that he was holding "a temporary worker visa which strictly requires the holder to file the change of status application before the current one expires " Defendant's Ex P (doc 48-10, p 14) Plaintiff complained that because the University only notified him "8 business days before the new semester began," he did not have a chance to "acquire another job " *Id.*

[10] Provost Austin to Plaintiff responded to Plaintiff's requested review of the decision not to hire him for the tenure track position in 2005 in a letter dated December 20, 2005 Defendant's Ex T (doc 48-10, pp 35-36) The Provost explained that although Plaintiff's "application was quite impressive," the committee recommended "Dr Hongmei Chi, as it deemed that she was best suited for the job " *Id.* The letter explained the faculty collective bargaining agreement which limits a visiting appointment to not "exceed a total of

statement because of his national origin *Id.* Plaintiff said that he would not have an immigration problem if he were an American citizen and by the Provost mentioning it to him, it shows "she knew about [his] national origin." Plaintiff's deposition, p. 34 (doc. 48-4, p. 67).

During his deposition, Plaintiff also could not identify any person on the faculty search committee who was biased against him because of his national origin. Plaintiff's deposition, p. 39 (doc. 48-4, p. 77). Plaintiff could point to no one who Plaintiff believed was biased against him because he was from Taiwan. Plaintiff's deposition, p. 187 (doc. 48-5, p. 203). Plaintiff stated only that he believed that because FAMU had hired "an unqualified African-American in 2002, then they hired an Indian in 2003, then . . . they hired a Chinese in 2006," he deduced that it must be because "they don't like Taiwanese." Plaintiff's deposition, p. 40 (doc. 48-4, p. 79).

In his deposition, Plaintiff could not point to any evidence that Dr. Jones was biased against Plaintiff either because he is Taiwanese Plaintiff's deposition, pp. 58-59 (doc. 48-4, pp. 115-117). Plaintiff indicated he never heard Dr. Jones make any comments concerning his national origin, but said that Dr. Jones had spoken to him about his English, which

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four (4) consecutive years " *Id.* The letter ended with the following paragraph

> You should be aware that the University's Office of International Programs informed me that you may be in violation of the requirements of your visa because you are no longer employed by Florida A&M University, yet you remain in the United States under your HB-1 visa that was procured through the University .

Defendant's Ex T (doc 48-10, p 36)

Plaintiff believes is the equivalent of discriminating against him based on his national origin. Plaintiff's deposition, pp. 58-59 (doc. 48-4, pp. 115-117) During Plaintiff's evaluation, Dr Jones told Plaintiff that his English was occasionally difficult to understand. Doc. 49, p. 3; Plaintiff's deposition, pp 59-60, 66-68 (doc. 48-4, pp 117-119, 131-135). On Plaintiff's Teacher Evaluation Form following the Spring, 2004 semester, Dr. Jones noted: "Language is a challenge – needs to speak more slowly Compensates by preparing clear slides Instructor will work on slowing down his speech." Plaintiff's Ex. 11 (doc 60-3 p 1). On the April 4, 2005, annual evaluation, Dr Jones indicated: "Language is a challenge. Improvement in speed and articulation since last evaluation; good notes compensate " Plaintiff's Ex. 11 (doc 60-3, p. 4). Plaintiff considers the remarks by Dr Jones to be "picking on" him. Doc. 49, p. 3; Plaintiff's deposition, pp. 59-60, 66-68 (doc. 48-4, pp. 117-119, 131-135). Plaintiff acknowledged, however, that he was rehired by Dr. Jones in 2002, 2003, and 2004, and Dr Jones knew during those years that Plaintiff was Taiwanese. Plaintiff's deposition, p. 77 (doc 48-4, p. 153).

Plaintiff testified in his deposition that he had no direct evidence of discrimination and no information he could point to that would explain a bias against him and in favor of Dr Chi. Plaintiff's deposition, pp. 44, 77-78 (doc 48-4, pp. 87, 153-155). Plaintiff testified he would prove discrimination through indirect evidence. Plaintiff's deposition, p. 78 (doc. 48-4, p. 155). Plaintiff disputed the three reasons given by FAMU and believed that his teaching performance was better than Dr Chi's,

and thought that was what FAMU meant in saying that she worked well with other faculty. Plaintiff's deposition, pp. 78-79 (doc. 48-4, pp. 155-157). Plaintiff also believed Dr. Chi's English was worse than his. Plaintiff's deposition, p. 82 (doc. 48-4, p. 163) When asked whether her spoken English or written English, or both, were better, Plaintiff answered:

> Okay, this – okay, I believe, okay, her written English, okay is worse than mine, but spoken English, it depends on who is there listening. I mean, because, okay, most of the people in Florida, they use the southern accent, and I don't know if they are used; okay, to the accent of Dr. Chi. So I really cannot comment on that part.

Plaintiff's deposition, p. 82 (doc. 48-4, p. 163).

Defendants have presented as evidence a memorandum issued to Provost Austin from Dr. Edward L. Jones, Chairman. Doc 48-6, p. 23. The memo was dated June 22, 2006, and verifies that Dr. Jones had evaluated Dr. Hongmei Chi's "ability to speak the English language," and Dr. Jones reported being "satisfied with her proficiency in this area." *Id.*

Plaintiff contends in his statement of facts that "Edward Jones and possibly Clement Allen have discriminatory motives" based on the fact that both persons made comments about Plaintiff's speech. Doc. 61, p. 6. Plaintiff states in his affidavit that a member of the faculty search committee, Clement Allen, invited Plaintiff to his office for a talk. Plaintiff's affidavit, Ex. 1 (doc. 61, p. 12). Allen advised Plaintiff that he should "improve" his English and "should not please students by giving easy grades." Plaintiff's affidavit, Ex. 1 (doc. 61, p. 12). Plaintiff

reported that the conversation occurred shortly after June 19, 2003, when Plaintiff had a grade change request denied. Plaintiff's affidavit, Ex. 1 (doc. 61, p. 12).

Plaintiff acknowledges that his English is sometimes difficult to understand. Doc. 49, p. 3, Plaintiff's deposition, p. 59 (doc. 48-4, p. 117) However, Plaintiff feels that he is only hard to understand when he is "irritated." Doc 61, p. 8; Plaintiff's deposition, pp. 66-67 (doc. 48-4, pp. 131-133). Plaintiff does not, in general, agree that he is difficult to understand when speaking English Doc. 61, pp. 4-5, 8-9.

Plaintiff has submitted the Investigative Memorandum, dated January 17, 2007, by the Florida Commission on Human Relations. Plaintiff's Ex. 10 (doc. 60-2. p 79). The investigation concerned Plaintiff's allegation against FAMU that he "was repeatedly denied a permanent position because of his national origin (Taiwanese)." *Id.* Although hearsay, the memorandum indicated that Dr Ken Riggs, an Associate Professor, had reported to Plaintiff "that during a faculty search committee meeting, Dr. Jones indicated that [Plaintiff] would have to work on his English." Plaintiff's Ex 10, p. 3 (doc. 60-2, p 81).[11]

Plaintiff acknowledged in his deposition that others have also told him he was sometimes difficult to understand. Plaintiff's deposition, p. 67 (doc. 48-4, p. 133). However, Plaintiff explained that when people mention they have difficulty understanding him, such as the FCHR investigator, it must be "her prejudice." Plaintiff's deposition p. 67 (doc 48-4. p.

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[11] There is no indication as to when this statement was made but Plaintiff's evidence has been noted

133). Plaintiff's opinion, however, is that his English was better than Dr. Chi's English. Plaintiff's deposition, p. 82 (doc. 48-4, p. 163). Further, he explains that when he is nervous or irritated, he tends to speak fast, but states his personal belief that he is not difficult to understand. Plaintiff's deposition, p. 67 (doc. 48- 4, p. 133)

> Q: Do you think that she was lying when she said that, the investigator at the FCHR?
>
> A: More or less.
>
> Q What motive would she have to lie?
>
> A: Maybe she was not lying, but, okay, I can say, okay, that's her prejudice. And, again, I was nervous when she interview me. So sometimes, okay, under the same circumstance, as far as, okay, irritate by the one who question me, and I tend, okay, to speak, okay, or first, okay, try to explain the thing. So that's how I, okay, speak fast.

Plaintiff's deposition, p. 67 (doc. 48-4, p. 133).

In addition to knowing Dr. Chi was ranked higher than Plaintiff, Plaintiff was also aware that she had published and co-authored articles with Dr. Jones, the Department Chair. Doc 49, p. 3; Plaintiff's deposition, pp. 54, 56 (doc. 48-4, p. 107) Plaintiff believes, in part, that Dr. Chi was selected over Plaintiff because Dr Jones could take credit for publications even though he did not work on them Plaintiff's deposition, pp. 54, 46 (doc. 48-4, pp. 107, 111). Plaintiff testified that Dr Chi published substantially more publications than he had published. Plaintiff's deposition, p. 49 (doc. 48-4, p. 97).

Plaintiff also acknowledges that Dr. Chi collaborated with other faculty members more than Plaintiff and admits he did not collaborate with others. Doc. 49, p. 3; Plaintiff's deposition, pp. 50, 80-81, 90 (doc. 48-4, p. 99, 159-161, doc. 48-5, p. 9). Plaintiff believes that the search committee should have put more weight and value on the fact that Plaintiff was nominated, although not awarded, the Teacher of the Year award Plaintiff's deposition, p. 74 (doc. 48-4, p. 147)

Plaintiff stated in his deposition that he believes he is "better qualified than all those candidates selected by FAMU" and that he is more dedicated to the University. Plaintiff's deposition, pp. 44, 70, 105 (doc. 48-4, pp. 87, 138; doc. 48-5, p. 39). Plaintiff also believes he is more qualified because he had more teaching experience, Plaintiff taught at FAMU for three and a half years, while Dr Chi had only taught (at FAMU) for one and a half years. Plaintiff's deposition, pp. 38-39, 111-112 (doc. 48-4, pp. 89-91; doc. 48-5, pp. 51-53) Plaintiff acknowledges he is unaware of Dr. Chi's work experience prior to working at FAMU Plaintiff's deposition, p. 46 (doc 48-4, p. 91).

Plaintiff has suggested[12] that Edward Jones did not simply approve a recommendation from the search committee in 2006, because Plaintiff notes that Jones signed the recommendation on July 3, 2006, which Plaintiff contends was four days prior to the committee making the recommendation Doc. 61, p. 2; Plaintiff's exhibits 19, 20, and 21 (doc. 60-3, p. 26; doc.

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[12] Plaintiff suggests that alterations were made to Dr Chi's resume in 2006 and to Plaintiff's resume in 2005. Doc 61, p 3 Plaintiff provides no basis for his statements, and these assumptions are not evidence properly considered

60-4, pp. 1, 2). Plaintiff also notes that he had been nominated by students for the Teacher of the Year Award in 2002, and that several students he had directed had won awards at major competitions. Doc. 61, p. 4. Plaintiff contends that those facts support a finding that his "language did not affect his teaching performance at all." *Id.*

While Plaintiff was a visiting professor at FAMU, he was recommended as Teacher of the Year by Dr. Ken Riggs, an Assistant Professor in the Department of Computer and Information Sciences [CIS] Defendant's Ex. K (doc. 48-8, p. 18). Defendant also presented a "letter of support" for Plaintiff, written by Dr Edward Jones, the CIS Chairman, on February 14, 2003. Defendant's Ex. J (doc. 48-8, p 17). The letter states that Dr Jones was impressed by Plaintiff's interaction with students, his character, and was, in general, a positive letter recommending Plaintiff *Id.* The letter closes with the following:

> Of all the qualities that make a teacher, Dr. Tseng's greatest strength is his character He engenders the trust of students, providing an environment where learning can occur. He has also shown the willingness to learn the craft of teaching by responding to input from other faculty members. I am hopeful that Dr. Tseng will be a contributing member of the CIS faculty for many years to come.

Defendant's Ex. J (doc. 48-8, p. 17). Defendants have also presented other letters in support of Plaintiff's application for a faculty position at other universities. One letter was written by Dr. Usha Chandra, an Associate Professor in the CIS Department at FAMU. Defendant's Ex M (doc 48-8, p. 20). That letter was

written in September of 2004, and states that Plaintiff would "make an excellent faculty member and [would] contribute greatly to" the department. *Id.* Similarly, a letter from Dr. Prasad, an Assistant Professor, was also presented in support of Plaintiff's application for a faculty position. Defendant's Ex M (doc. 48-8, p. 21) Further, a letter in support of Plaintiff by Dr. Ken Riggs was provided. *Id.*, at 22. Dr. Riggs states that he "had intended" that Plaintiff "would be staying" at FAMU, but Dr. Riggs provides an enthusiastic recommendation and describes him as "an asset to the department." *Id.* Dr. Riggs closes by noting that Plaintiff's departure from FAMU was their "misfortune." *Id.*

As mentioned above. Plaintiff previously filed a complaint with the EEOC and Florida Commission on Human Relations alleging that FAMU discriminated against him and that "he was repeatedly denied a permanent position because of his national origin (Taiwanese) " Plaintiff's Ex. 10 (doc. 60-2, p. 79). The evidence Plaintiff submitted in this case, which was part of that prior investigation, shows Plaintiff applied for permanent positions with FAMU in 2001 and 2003, but was not selected. Plaintiff's Ex. 10 (doc. 60-2, p. 80). It appears from that Investigation that in 2003, Dr. Jones had told Plaintiff "he needed to improve his English speaking." Plaintiff's Ex 10 (doc. 60-2, p. 81).

The investigation also noted that when Plaintiff and Dr Chi both applied for a position in 2005, Plaintiff had more experience teaching at FAMU, and had "experience teaching graduate students." Plaintiff's Ex. 10 (doc. 60-2, pp. 81-82). "Dr. Chi's teaching evaluations from students were better than" Plaintiff's and she "had the highest evaluations in the

department." Plaintiff's Ex. 10 (doc. 60-2, p. 82). As part of that investigation, Dr. Jones submitted an affidavit which was quoted in the Investigative memorandum. Plaintiff's Ex. 10 (doc. 60-2, p. 81). There, Dr. Jones stated, "Chi's communication skills surpassed those of [Plaintiff]. It is important that our faculty have a command of spoken English, especially in technical fields." Plaintiff's Ex. 10 (doc. 60-2, p. 82) Furthermore, when responding to Plaintiff's complaint of discrimination, the University answered:

> Communication was an issue that called for improvement and was discussed with [Plaintiff] during his evaluations. The University decided to give [Plaintiff] an opportunity to improve his communication skills by continuing to offer a visiting position; however, [Plaintiff's] communication skills did not improve.

Plaintiff's Ex. 10 (doc. 60-2, p. 84). The result of that Florida Commission on Human Relations investigation was a finding that there was not "reasonable cause to believe that [FAMU] unlawfully discriminated against [Plaintiff] because of his national origin." Plaintiff's Ex. 10 (doc. 60-2, p. 87).

As additional evidence, Plaintiff presented a page from the website of the Equal Employment Opportunity Commission. Plaintiff's Ex. 14 (doc. 60-3, p. 11). That page explains that it is discriminatory under Title VII for an employer to base an employment decision such as hiring or firing "on an employee's foreign accent unless the accent materially interferes with job performance." *Id.*; *see also* (doc 60-3, p. 13). In discussing "accent discrimination," the webpage noted the following:

> An employment decision based on foreign accent does not violated Title VII if an individual's accent materially interferes with the ability to perform job duties. This assessment depends upon the specific duties of the position in question and the extent to which the individual's accent affects his or her ability to perform job duties. Employers should distinguish between a merely discernible foreign accent and one that interferes with communication skills necessary to perform job duties. Generally, an employer may only base an employment decision on accent if effective oral communication in English is required to perform job duties and the individual's foreign accent materially interferes with his or her ability to communicate orally in English. Positions for which effective oral communication in English may be required include teaching, customer service, and telemarketing. Even for these positions, an employer must still determine whether the particular individual's accent interferes with the ability to perform job duties.

Plaintiff's Ex. 14 (doc. 60-3, p. 13) Plaintiff has also presented as evidence a memorandum from the General Counsel's office for FAMU explaining that "[c]ommunication was an issue that called for improvement and was discussed with [Plaintiff] during his evaluations." Plaintiff's Ex. 18 (doc. 60-3, p. 24). "The University decided to give [Plaintiff] an opportunity to improve his communication skills by continuing to offer a visiting position; however, [Plaintiff's] communication skills did not improve." *Id.*

Legal Analysis

Title VII of the Civil Rights Act of 1964 forbids discrimination in employment based on an individual's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Plaintiff has the burden of establishing a *prima facie* case of intentional discrimination or disparate treatment. Plaintiff may do so by direct evidence of discrimination, such as discriminatory statements or written notations. Hawkins v. Ceco Corporation, 883 F.2d 977, 986 (11th Cir. 1989), *cert. denied*, 495 U.S. 935 (1990). In the usual case, however, direct evidence of discriminatory intent is not available. A plaintiff may then use the method established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) to demonstrate discrimination.

Here, Plaintiff has not presented any "direct evidence," that is, evidence from which no factual inferences must be drawn and which expresses discriminatory intent. Browning v. President Riverboat Casino-Missouri, Inc., 139 F.3d 631, 635 (8th Cir. 1998) (evidence direct where no inference necessary); Nguyen v. City of Cleveland, 229 F 3d 559, 563 (6th Cir. 2000) (noting a facially discriminatory employment policy or express statement concerning persons in the protected group is direct evidence), *citing* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985). The indirect method of proof as set in McDonnell Douglas, *supra*, applies in this case.

To establish a *prima facie* case, Plaintiff must show that he (1) belongs to a protected group; (2) was subjected to adverse job action; (3) the employer treated similarly situated employees

outside his classification more favorably; and (4) he was qualified to do the job. McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824, 36 L Ed. 2d at 677, *cited in* Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997) When a *prima facie* case is made by the plaintiff, the burden of producing evidence shifts to the defendant to "articulate" or produce some evidence of a legitimate, nondiscriminatory reason for either terminating or not hiring the plaintiff. *Id.*; Texas Dept. of Community Affairs v. Burdine, 450 U.S. 257, 254-55, 101 S. Ct. 1089, 1094, 67 L. Ed. 2d 207 (1981) The burden of persuasion, which has always been upon the plaintiff, then requires plaintiff to prove that the reasons presented by the employer are pretextual and that intentional discrimination based upon an improper criterion was the motive. U. S. Postal Service Board of Governors v. Aikens, 460 U.S. 715, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). To do so, a plaintiff must come forward with evidence "sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision " Combs v. Plantation Patterns, 106 F.3d 1519, 1528 (11th Cir. 1997), *citing* McDonnell Douglas, 411 U.S. at 804, 93 S. Ct. at 1825.

It is undisputed that Plaintiff is from Taiwan and, thus, is part of a "protected group." It is also undisputed that he was not hired. Accordingly two of the four elements necessary to present a *prima facie* case have been shown: that Plaintiff belongs to a protected group and was subjected to an adverse job action. It must also be accepted as undisputed that FAMU treated similarly situated employees outside Plaintiff's classification more favorably in that a non-Taiwanese person was hired for the position. This satisfies the third element.

Finally, it is now accepted that Plaintiff was qualified to do the job as Defendants do not dispute that fact. Doc. 48, p. 10. This was an issue raised *sua sponte* after review of the initial summary judgment materials, and the parties were ordered to address the question of whether Plaintiff was "qualified." Doc. 62.

The issue arose because Dr. Jones said in a letter that Dr. Chi was not hired because the University issued a "directive" that tenure track appointments would no longer be made to "persons who are not U.S. citizens or permanent residents." Doc. 62, p. 2, *citing* Plaintiff's Ex. 26 (doc. 60-4, p. 9). The letter stated that because of that, "Dr. Chi's recommendation was revised and the appointment status changed 'from Tenure-Earning to Visiting' Professor." Doc. 62, p. 2, *citing* Plaintiff's Ex. 26 (doc 60-4, p. 9). It was undisputed that Plaintiff was not a United States citizen.

As noted in my earlier order, this evidence suggested Plaintiff was not qualified for a tenure-track position and, thus, could not have been discriminated against if he was not "qualified." Doc. 62, p. 2, *citing* Plaintiff's deposition, pp. 35, 36 (doc. 48-4, pp. 69-71). However, Defendants' supplemental evidence did not contain the "directive" as ordered. Indeed, in the supplemental memorandum, Defendants explain that they have not been able "to locate any 'directive' issued by the University" which supports the statement of Dr. Jones in his letter to Dr. Greenleaf (concerning the salary of Dr. Chi) that a "directive" prohibited tenure track appointments to persons who are not United States citizens or permanent residents. Doc. 71, pp. 2-4. In light of the evidence that no such "directive" exists, and

Defendants' suggestion in the memorandum that Dr. Jones was "mistaken" about the existence of such a directive or policy. *see* doc. 71, it is accepted that Plaintiff was qualified[13] to have been hired by FAMU in 2006, even though he did not have permanent residency status nor was he a United States citizen.[14]

Thus, Defendants' argument that Plaintiff has not shown a *prima facie case* of employment discrimination is not persuasive Plaintiff has met his burden and alleged circumstances giving rise to an inference of unlawful discrimination. Therefore, the burden shifts to Defendants to produce evidence of a legitimate, nondiscriminatory reason for not hiring Plaintiff.

Defendants assert "there were at least two reasons for preferring Dr. Chi over Plaintiff; (1) she collaborated with her other faculty members better; and (2) had better English skills." Doc. 48, p. 7. Defendants contend that collaboration is not a discriminatory reason and that "English skills are obviously important to effective communication in

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[13] Defendants also argued that Plaintiff had been employed the maximum time permissible for a Visiting Professor, four years Doc 48, p 2 Despite that, Defendants never make the assertion that Plaintiff was not "qualified" to resume his employment Yet, as noted previously in this report and recommendation, Defendants' supplemental evidence shows that an employee with an H-1 B visa could fill a position "for a period of up to a maximum of six years " Defendant's Supp (Doc 69-4, p 1) Even though Defendants had provided evidence that under the collective bargaining agreement, a visiting professor was purportedly limited to four years of employment, that may not be correct In any event, this does not appear to be a material dispute of fact

[14] Plaintiff argues that the advertisements for the positions do not state a "requirement for permanent residency" either Doc 72, p 1

teaching." *Id.*, at 8. Defendants have acknowledged that "Plaintiff had good qualifications," yet assert that Dr. Chi was ranked higher by the panel in both the 2005 and 2006 hiring decisions. Doc. 48, p. 6. Defendants note that the five person panel was composed of different faculty in 2005 and 2006, yet Plaintiff was not recommended for the positions. *Id.*, at 2, 6. Defendants deny that the hiring decision was motivated in any way by Plaintiff's national origin. Doc. 48, p 6, *citing* to the Jones and Granville affidavits Defendants also note that Plaintiff previously thought the decision to hire Dr. Chi instead of him was due to salary considerations. *Id.*, at 7.

Defendants put forth "at least two reasons for preferring Dr. Chi over Plaintiff; (1) she collaborated with her other faculty members better; and (2) had better English skills." Doc. 48, p. 7. Defendants argue that "English skills are obviously important to effective communication in teaching " *Id.*, at 8. Furthermore, while noting that Plaintiff quibbles over a word choice, Defendants point out that even Plaintiff acknowledges that Dr Chi collaborated more than he. *Id.*, at 7-8.

Plaintiff does not dispute that Dr. Chi collaborated with more faculty than he did, and he makes much of the fact that Dr. Chi collaborated with Dr. Jones, suggesting that this was done to give her an advantage in the hiring process. Even *if* this collaboration effort gave Dr. Chi a political advantage over Plaintiff, it is not an unlawful advantage based upon Plaintiff's national origin. The degree to which a person collaborates with others in a university setting is a reasonable criterion for making a hiring decision in that setting Further, Dr. Chi had produce

more publications than Plaintiff, and Dr. Chi was a collaborator with another person in each publication. Research and publications are a legitimate hiring considerations. Plaintiff has not shown that these factors were pretextual.

A more difficult issue is whether the stated reason that Dr Chi had better English skills has been shown by Plaintiff to be a pretext for discrimination. A plaintiff "may not establish that an employer's proffered reason is pretextual merely by questioning the wisdom of the employer's reasons, at least not where . . . the reason is one that might motivate a reasonable employer." Alexander v. Fulton County, 207 F 3d 1303, 1339 (11th Cir. 2000), *quoted in* Brooks v. County Com'n of Jefferson County, Ala., 446 F.3d 1160, 1163 (11th Cir. 2006). It is not for the Court to decide if the employer made a wise business decision. Combs v. Plantation Patterns, 106 F 3d 1519 (11th Cir.-1997). Thus. a plaintiff may not claim that an employer's "proffered reason is pretextual merely by questioning the wisdom of the employer's reason," at least where the reason provided "is one that might motivate a reasonable employer." *Id* at 1543; *see also* Springer v. Convergys Customer Management Group Inc., 509 F.3d 1344, 1350 (11th Cir. 2007) (concluding that supervisor's view of the employee's qualifications is a reasonable business decision). Plaintiff must show that the decision to not hire him was based on an impermissible, unlawful reason, that is, his national origin The issue is not whether FAMU made the *right* decision as to whose communication skills were better.[15]

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[15] Defendants contend that Plaintiff's argument concerning English skills is "fatally flawed " Doc 48, p 8. Plaintiff has a

Plaintiff argues that concern for his "pattern of speech" or "manner of speaking" is a form of national origin discrimination. Doc. 61, p. 6; doc. 60, p. 5. It is true that "[t]he EEOC recognizes linguistic discrimination as national origin discrimination and prohibits 'the denial of equal employment opportunity . . . because an individual has the . . . linguistic characteristics of a national group.' " 29 C.F.R. § 1606, *quoted in* Ang v. Procter & Gamble Co., 932 F.2d 540, 549 (6th Cir. 1991), *see, e.g.*, Rivera v. Baccarat, Inc., 10 F.Supp.2d 318, 324 (S.D.N.Y.1998). "[D]iscrimination based on manner of speaking can be national origin discrimination." Ang, 932 F 2d at 549, *citing to* Berke v. Ohio Dep't of Pub. Welfare, 628 F.2d 980, 981 (6th Cir. 1980). However, "[t]here is nothing improper about an employer making an honest assessment of the oral communications skills of a candidate for a job when such skills are reasonably related to job performance." Fragante v. City and County of Honolulu, 888 F.2d 591, 596-597 (9th Cir. 1989). The important question is whether an individual's foreign accent or manner of speaking English "interferes materially with job performance." Fragante, 888 F.2d at 596 (Filipino not chosen for clerk job because of "perceived deficiency in relevant oral communication skills cause bed his 'heavy Filipino accent'-").[16] *E.g.*, Mejia v. New York Sheraton Hotel, 459 F.Supp. 375, 377 (S.D. N.Y. 1978) (Dominican

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subjective belief that his English skills are better than Dr. Chi's Defendant contends that if that were in fact true, then Dr Chi would

[16] In Fragante, the court held that the plaintiff was not qualified for a job where his accent made him difficult to understand and the position required an "applicant to be able to communicate clearly and effectively " 888 F 2d at 595

national chambermaid was properly denied promotion to front desk because of her inability "to articulate clearly or coherently and to make herself adequately understood in the English language."); Meng v. Ipanema Shoe Corp., 73 F Supp.2d 392, 399 (S.D. N.Y. 1999) (summary judgment granted to defendant that terminated Chinese customer service representative based on fact that "some of her customers had trouble understanding her"); Thelusma v. New York City Bd. of Educ., 2006 U.S. Dist. LEXIS 64855, at *8-9 (E.D. N.Y. 2006) (court granted summary judgment to Defendant that terminated Haitian public school teacher even though Defendant recommended that Plaintiff take "accent reduction classes"); Chang v. University of Toledo, 480 F.Supp.2d 1009 (N D. Ohio 2007) (finding Asian professor failed to present evidence of discrimination where offensive language was not used nor was his origin considered as a factor in his evaluation)

In this case, there is no evidence that any person made fun of Plaintiff's speech, mocked his manner of speaking, or used offensive language concerning his speech, accent, or nationality. *See* Dunaway v. Int'l Bro. of Teamsters, 310 F.3d 758, 765-766 (D C. Cir. 2002) (finding use of derogatory national origin comments); Manatt v. Bank of America, 339 F.3d 792, 795-799 (9th Cir. 2003) (noting comments and jokes were made of plaintiff's Chinese ethnicity, and employees mocked her physical appearance). There is no evidence that any person involved in the selection process even considered Plaintiff's nationality.

The evidence shows only that Defendants thought that Plaintiff needed to work on his English

skills. The comments were made to Plaintiff in the course of his annual evaluation, not in a public manner and not designed to ridicule Plaintiff. Teaching is the process by which one human imparts knowledge to others through communication. Communication skills are absolutely essential for a teacher to perform the work of teaching

Plaintiff disputes that Dr. Chi's communication abilities and her teaching skills are superior to his, but Plaintiff has not shown that Defendant's concerns are not valid, or that a "reasonable factfinder could find them unworthy of credence." Springer v. Convergys Customer Management Group Inc., 509 F.3d 1344, 1348-1 349 (11th Cir 2007), *citing* Cooper v. Southern Co., 390 F.3d 695, 725 (11th Cir 2004), cert. denied, 546 U.S. 960 (2005) (quoting Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997)). Put another way, "a plaintiff cannot prove pretext by simply arguing or even by showing that he was better qualified than the [person] who received the position he coveted. A plaintiff must show not merely that the defendant's employment decisions were mistaken but that they were in fact motivated by race." Springer, 509 F.3d at 1349, *quoting* Brooks v. County Comm'n of Jefferson County, 446 F.3d 1160, 1163 (11th Cir. 2006), *citing* Alexander v. Fulton County, 207 F.3d 1303, 1339 (11th Cir. 2000). There is evidence in this record to show Plaintiff has difficulty communicating, and was advised by the University to work on those skills. There is evidence that Dr. Chi's English skills were evaluated and found to be satisfactory. Plaintiff has not shown this concern to be untrue, or put forward to hide discrimination based upon his national origin.

Plaintiff has attempted to detract from the two expressed reasons of Defendant by arguing that the resumes provided by Defendants appear to be fabricated, that the search process was manipulated, that there were abnormalities in the search committee's activities and rankings of applicants, that Defendants were not truthful in stating why no position was filled in 2005, and that Defendants belatedly point to Dr. Chi's research performance as a reason to not hire Plaintiff Doc. 60, pp. 8-14. Those arguments do not advance Plaintiff's case as they do not point to the invalidity of the asserted reasons as to why Dr. Chi was chosen over Plaintiff, nor do they provide any evidence of discrimination. Plaintiff's arguments attempt to dispute immaterial facts which are not relevant to the overriding issue are the reasons proffered by Defendants merely a pretext for discrimination?

Even accepting Plaintiff's argument that there exists a discrepancy in dates (that Jones made recommendations to the Dean four days before the Committee presented him with its recommendations), this is a dispute of immaterial fact. While it implies an irregularity in the intended procedure, it is not an irregularity pointing to discrimination against Plaintiff due to his national origin. Moreover, Plaintiff's suggestions that the selection process was ultimately not followed is incorrect, *see* doc. 51, p. 6, because the Department Chair did not substitute another candidate for the candidate chosen and recommended by the Committee. There is no evidence to suggest that Dr. Chi was *not* the candidate recommended by the Committee.

In summary, it would appear in this case that Defendants had a difficult decision to make. Both

Chi and Plaintiff were qualified. Both had good records. Plaintiff has not shown that the reasons proffered for this difficult decision were pretextual. The decision was not based upon Plaintiff's national origin. Defendants' motion for summary judgment should be granted and judgment entered in favor of Defendant.

RECOMMENDATION

Accordingly, it is **RECOMMENDED** that Defendants' motion for summary judgment, doc. 48, be **GRANTED** and the Clerk be **DIRECTED** to enter judgment in favor of Defendants.

IN CHAMBERS at Tallahassee, Florida, on August 5, 2009.

s/ William C. Sherrill, Jr.

WILLIAM C. SHERRILL, JR.
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

A party may file specific, written objections to the proposed findings and recommendations within 15 days after being served with a copy of this report and recommendation. A party may respond to another party's objections within 10 days after being served with a copy thereof. Failure to file specific objections limits the scope of review of proposed factual findings and recommendations.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

YILI TSENG
Plaintiff,

vs. CASE NO. 4:08-CV-91-SPM-WCS

FLORIDA A & M UNIVERSITY and
FLORIDA A & M UNIVERSITY BOARD
OF TRUSTEES,
Defendants

ORDER ADOPTING SECOND REPORT AND RECOMMENDATION

THIS CAUSE comes before the Court for consideration of the Magistrate Judge's Second Report and Recommendation (doc. 73), which recommends that Defendants' Motion for Summary Judgment (doc. 48) be granted. Plaintiff has been afforded an opportunity to file objections pursuant to Title 28, United States Code, Section 636(b)(1). Plaintiff, who is pro se, filed objections (doc. 76). Pursuant to Title 28, United States Code, Section 636(b)(1), I have conducted a de novo review of the sections of the report to which objections have been made. I find that the Report and Recommendation is correct and should be adopted.

Plaintiff first objects to the Magistrate Judge's finding that the Defendants' reasons for promoting Hongmei Chi, a national of the People's Republic of

China, in lieu of Plaintiff, a national of the Republic of China (Taiwan), were not pretext for discrimination based on national origin. Doc. 76, p. 2. Plaintiff also asserts that the Magistrate Judge improperly denied discovery regarding the faculty selection processes from years prior to 2006, and should have considered evidence from those years. Doc. 76, p. 15-16. Despite these objections, I find that Plaintiff has failed to raise an issue of material fact. I therefore adopt the Report and Recommendation and grant Defendants' motion for summary judgment.

I. Pretext

Plaintiff bears the burden of demonstrating that Defendants' reasons for taking adverse action against Plaintiff were pretextual Combs v. Plantation Patterns, 106 F .3d 1519, 1527 (11th Cir. 1997). The Court must examine all the evidence to determine "whether the plaintiff has cast sufficient doubt on the defendant's proffered nondiscriminatory reasons to permit a reasonable factfinder to conclude that the employer's proffered legitimate reasons were not what actually motivated its conduct." Crawford v. Carroll, 529 F.3d 961, 976 (11th Cir. 2008) (quoting Combs, 106 F.3d at 1538). To carry this burden, Plaintiff must demonstrate *"both* that [Defendants'] reason was false, *and* that discrimination was the real reason." Brooks v. County Commission, 446 F .3d 1160, 1163 (11th Cir. 2006) (emphasis added) (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993)).

Here, Defendants have asserted two reasons for hiring Hongmei Chi: (1) that Chi's communication skills were superior to Plaintiffs, and (2) that Chi collaborated with fellow faculty members more than

Plaintiff. Thus, Plaintiff must produce sufficient evidence to permit reasonable factfinder to conclude *both* that neither of these reasons was the real reason Defendants chose Chi over Plaintiff, *and* that discrimination based on national origin was the real reason.

A. Communication

Defendants have asserted that they made the employment decision in question because Chi's communication skills were superior to Plaintiff's. Plaintiff argues that this reason was pretextual, and that the real reason was discrimination based on Plaintiff's national origin.

As the Magistrate Judge observed, Plaintiff cannot prove pretext "merely by questioning the wisdom of [Defendants'] reasons, at least not where ... the reason is one that might motivate a reasonable employer." Brooks, 446 F .3d at 1163, quoting Alexander v. Fulton County, 207 F.3d 1303, 1339 (11th Cir. 2000); see also Elrod v. Sears, Roebuck, and Co., 939 F.2d 1466, 1470 (11th Cir. 1991) ("Federal courts do not sit as a super-personnel department that reexamines an entity's business decisions ") (citation omitted). Instead, Plaintiff must demonstrate that his superior qualifications were "of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question." Cooper v. Southern Co., 390 F.3d 695,732 (11th Cir. 2004) (quoting Lee v. GTE Fla., Inc., 226 F.3d 1249, 1254 (11th Cir. 2000)).

The Magistrate Judge correctly determined that, because Plaintiff was a teacher, consideration of the candidates' communication skills was proper. Plaintiff has acknowledged that there was no great

disparity between Plaintiff's English and Chi's English. "I believe, okay, her written English, okay is worse than mine, *but spoken English, it depends on who is there listening* .... I do not know if they are used, okay, to the accent of Dr. Chi. So I really cannot comment on that part." Doc 48-4, p. 163 (emphasis added). Because Plaintiff has failed to produce evidence that his qualifications were sufficiently superior to Chi's, Plaintiff has not demonstrated that this proffered reason was false.

Furthermore, Plaintiff has not produced sufficient evidence for a reasonable factfinder to determine that the real reason for Defendants' decision was discrimination based on national origin. While it is true that, under certain circumstances, an employer's criticism of an employee's accent can constitute discrimination, Plaintiff has failed to show that such circumstances are present here. As the Magistrate Judge observed, "there is no evidence that any person made fun of Plaintiff's speech, mocked his manner of speaking, or used offensive language concerning his speech, accent, or nationality." Doc. 73, p. 29.[17]

Any evidence that could be interpreted as a failure to follow Defendants' internal procedures is also insufficient to establish discriminatory intent. See Springer v. Convergys Customer Mgmt. Group, Inc., 509 F.3d 1344, 1350 (11th Cir. 2007) ("The mere fact that an employer failed to follow its own internal *procedures* does not necessarily suggest that the employer was motivated by illegal discriminatory

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[17] It is also worth noting that English is a second language for Chi, the Chinese national selected in Plaintiff's stead

intent or that the substantive reasons given by the employer for its employment decision were pretextual.") (internal citation omitted). Thus, even if Plaintiff had produced evidence that the Defendants' decision to promote Chi instead of Plaintiff was not based on the reasons given, Plaintiff's claim still fails for lack of evidence demonstrating the real reason was discriminatory.

B. Collaboration

Defendants have also asserted that the decision to promote Chi instead of Plaintiff was based on Chi's more extensive collaboration with fellow faculty members. Plaintiff claims that this proffered reason is also mere pretext, particularly in light of Defendants' failure to publish this criterion prior to the selection process.

However, Plaintiff has failed to demonstrate that collaboration with fellow faculty members was not an appropriate criterion to be considered by the committee. Nor does the fact that this criterion was not specifically stated make the committee's consideration of it discriminatory. See Lee v. GTE Florida, Inc., 226 F.3d 1249, 1255 n.2 (11th Cir. 2000) ("[T]he promotion decision is a dynamic one, and the relative importance placed on various selection criteria cannot be expected to remain fixed and unyielding.") (citation omitted); Chapman v. AI Transport, 229 F.3d 1012, 1033-34 (11th Cir. 2000) (recognizing the propriety of considering subjective criteria, such as attitude, articulateness, enthusiasm, and appearance).

In light of Plaintiff's admissions (a) that he did not collaborate with other faculty members (doc. 48-4, p. 99), and (b) that Chi did in fact collaborate with other faculty members (doc. 48-4, p. 161), Plaintiff's

remaining objections on this subject are invalid. Again, Plaintiff has failed to demonstrate that this proffered reason was false, or that Defendants' real reason for selecting Chi over Plaintiff was discriminatory.

II. Discovery

Plaintiff argues that the court should have allowed discovery regarding the selection processes in years prior to 2006, and also should have considered evidence from those prior years Doc. 76, p. 14. However, the Magistrate Judge properly determined that only the 2006 selection process is at issue (doc. 73, p. 2, 8), and Plaintiff acknowledges as much in his objections (doc. 76, p. 14).

In the Order dated December 3,2008 (doc. 43), the Magistrate Judge denied Plaintiff's Motion to Compel (doc. 37). The motion was denied because the information sought was outside the scope of the EEOC charge, were not "reasonably related" to the allegations in the EEOC charge, and were irrelevant to the 2006 selection process Doc 43, p. 4-7. Plaintiff did not challenge this order.

Plaintiff is attempting to avoid summary judgment by seeking a continuance or stay in order to conduct additional discovery. In order to do so, Plaintiff "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts, but must show the court how the stay will operate to permit him to rebut, through discovery,' [Defendants'] contentions." Barfield v. Brierton, 883 F.2d 923, 931 (11th Cir. 1989) (citation omitted).

Plaintiff has engaged in extensive discovery regarding the 2006 selection process, and has failed to produce any evidence that in any way links

Defendants' employment decision, to any consideration of Plaintiff's national origin. Even if the Magistrate Judge unduly limited discovery to 2006 (which Plaintiff admits is the only year at issue in this suit), Plaintiff has not shown that additional discovery would produce any evidence that would rebut Defendants' motion for summary judgment. Furthermore, Plaintiff did not serve and file objections to the Magistrate Judge's Order within 10 days, and is therefore not entitled to now assert that the Order was erroneous See Fed. R. Civ. P 72(a).

III. Conclusion

Plaintiff has not produced sufficient evidence to create a genuine issue of material fact regarding the veracity of Defendants' stated reasons for promoting Chi instead of Plaintiff Nor has Plaintiff produced any evidence that his national origin was the real reason Defendants chose to promote Chi instead of Plaintiff. Viewing all of the evidence in a light most favorable to Plaintiff, a reasonable factfinder could not conclude that Defendants' decision to promote Chi instead of Plaintiff was discriminatory.

Accordingly, it is hereby ORDERED AND ADJUDGED as follows.

1. The Magistrate Judge's Report and Recommendation (doc. 73) is *adopted* and incorporated by reference into this order
2. The Defendant's Motion for Summary Judgment (doc. 48) is *granted*.

DONE AND ORDERED this thirtieth day of September, 2009.

s/Stephan P. Mickle

Chief United States District Judge

APPENDIX C
[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-15297
Non-Argument Calendar

D. C. Docket No. 08-00091-CV-4-SPM-WCS

YILI TSENG,

Plaintiff-Appellant,

versus

FLORIDA A&M UNIVERSITY,
FLORIDA A&M UNIVERSITY
BOARD OF TRUSTEES,

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Florida

(May 27, 2010)

Before EDMONDSON, CARNES and FAY, Circuit Judges.

PER CURIAM:

Yili Tseng, a native of Taiwan proceeding pro se, appeals from the district court's grant of summary judgment in favor of Florida A&M University and its board of trustees (FAMU) in his

employment discrimination suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). Tseng was a visiting professor in FAMU's Department of Computer and Information Science. He alleged that FAMU discriminated against him on the basis of national origin when it promoted Hong-Mei Chi, another visiting professor who was from mainland China, to a tenure-track position instead of him, even though he was more qualified. FAMU responded that it picked Chi over him because she had better communication skills and a stronger record of collaboration with other faculty members. The district court found that Tseng had not presented any direct evidence of national origin discrimination, and had not shown that FAMU's proffered reasons for its decision were a pretext for discrimination. We affirm.

Title VII prohibits employers from discriminating against employees on the basis of national origin. See 42 U.S.C. § 2000e-2(a). A plaintiff may establish a Title VII claim by presenting direct evidence of discrimination, or circumstantial evidence that creates an inference of discrimination. Bass v. Bd. of County Comm'rs, 256 F.3d 1095, 1103 (11th Cir. 2001), abrogation on other grounds recognized by Crawford v. Carroll, 529 F.3d 961 (11th Cir. 2008).

I. Direct Evidence

"Direct evidence of discrimination is evidence which, if believed, would prove the existence of a fact in issue without inference or presumption. Only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of [the protected characteristic] . . . constitute direct evidence of discrimination." Bass, 256 F.3d at 1105

(quotations and citations omitted). As direct evidence, Tseng offers several comments by his supervisors in annual evaluations and in faculty meetings that "language is a challenge [for him]" and that he needed to "work on his English skills." Tseng argues that these comments unfairly "picked on" him for his accent and therefore constituted discrimination on the basis of his Taiwanese origin.

Discrimination based on accent can be national origin discrimination. SeeAkouri v. State of Fla. Dep't of Transp., 408 F.3d 1338, 1347 (11th Cir 2005) (supervisor's statement that Lebanese plaintiff was turned down for promotion because white coworkers were "not going to take orders from you, especially if you have an accent" was direct evidence of discrimination) However, an employee's heavy accent or difficulty with spoken English can be a legitimate basis for adverse employment action where effective communication skills are reasonably related to job performance, as they certainly are in a teaching position. See Jiminez v Mary Washington College, 57 F.3d 369, 380 (4th Cir 1995) ("[R]equiring that a professor speak the native tongue in order to convey his ideas is not any form of discrimination, invidious or otherwise."); cf.Fragante v. City and County of Honolulu, 888 F.2d 591, 596-97 (9th Cir 1989) (employer legitimately considered plaintiff's "heavy" and "difficult to understand" Filipino accent, where clerk job required interaction with general public and "oral ability to communicate effectively in English" was essential).

An investigator for the Florida Commission on Human Rights, who interviewed Tseng in connection with his discrimination claim, observed that his "accent and speech patterns might make it difficult"

for an average listener to understand him in a classroom setting.[18] Tseng himself agreed at his deposition that his English was "sometimes difficult to understand." He does not claim that anyone at FAMU mocked his accent or made disparaging remarks about the Taiwanese, and none of the statements he complained about specifically referred to his nationality. The comments could simply have been meant to help Tseng improve his effectiveness as a teacher. See Bina v. Providence College, 39 F.3d 21, 26 (1st Cir. 1994) ("[R]eferences to audience difficulty in understanding [plaintiff professor] may reasonably be interpreted as expressing a concern about his ability to communicate to students rather than discriminatory animus based on ethnicity or accent.") The fact that Tseng was passed over in favor of another foreign national, who also was not a native speaker of English, hardly supports a conclusion that FAMU acted out of animus toward foreigners or foreign accents. Because Tseng failed to identify any "blatant" remarks or actions "whose intent could be nothing other than to discriminate," the district court correctly found that he had not shown direct evidence of discrimination See Bass, 256 F.3d at 1105.

II. Circumstantial Evidence

In the absence of direct evidence, a plaintiff may establish a Title VII claim through circumstantial evidence that creates an inference of discrimination. Bass, 256 F.3d at 1103. To evaluate a claim based on circumstantial evidence, we use the framework established in McDonnell-Douglas Corp. v Green, 411 U.S. 792, 93 S.Ct. 1817 (1973). Id. at

---

[18] Tseng's response to that comment was that the investigator must have been "prejudice[d]."

1103-04. Under this framework, Tseng established a prima facie case of discrimination by showing that. (1) he was qualified for the position; (2) he was rejected despite his qualifications; and (3) an equally or less qualified employee who was not a member of his protected group (Taiwanese nationals) was hired in his place. See id at 1104. FAMU did not dispute that Tseng was qualified, and argued only that Chi was better qualified. The burden of production then shifted to FAMU to offer a legitimate, non-discriminatory reason for its decision to hire Chi instead of Tseng. See id. FAMU did so, pointing to Chi's superior communication skills and better record of collaboration. Accordingly, Tseng needed to show that FAMU's proffered reasons were pretexts for discrimination on the basis of national origin. See id.

To establish pretext, Tseng must show both (1) that FAMU's stated reasons for hiring Chi were false, and (2) that discrimination on the basis of Tseng's Taiwanese origin was the real reason. See Brooks v. County Comm'n of Jefferson County, 446 F.3d 1160, 1163 (11th Cir. 2006). "If the proffered reason is one that might motivate a reasonable employer, a plaintiff cannot recast the reason but must meet it head on and rebut it. Quarreling with [the employer's] reason is not sufficient." Wilson v B/E Aerospace, Inc., 376 F.3d 1079, 1088 (11th Cir. 2004) (citation omitted). Mere irregularities in the employer's internal hiring procedures are not enough to show pretext or establish discriminatory intent. SeeSpringer v. Convergys Customer Mgmt. Group, 509 F 3d 1344, 1350 (11th Cir. 2007). When a plaintiff asserts as Tseng does that discriminatory intent should be inferred from his superior qualifications, the test is whether the difference in

qualifications is "of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff." Brooks, 446 F.3d at 1163.

Tseng and Chi had generally similar backgrounds and qualifications, except that Tseng had slightly more teaching experience while Chi had several more publications. Tseng conceded that Chi had done more collaborative work with other faculty than he had done. As evidence that Chi's English-language communication skills were not superior to his own, Tseng pointed only to a handful of grammatical errors in three short emails written by Chi.[19] FAMU's choice between two candidates of roughly similar qualifications was not unreasonable. Even if Tseng were slightly more qualified than Chi in some respects, there was not such a disparity between them that "no reasonable person" could have selected Chi over him. See id.

Tseng's evidence does not show that FAMU's proffered reasons were false. Even if it did, Tseng offers nothing to suggest that a discriminatory animus against Taiwanese or preference for mainland Chinese was the real motivation for FAMU's decision. See id. FAMU hired and rehired Tseng for the visiting position four years in a row, all the while being well aware of his nationality. The district court correctly concluded that Tseng failed to make a circumstantial case for discrimination and it did not err in granting summary judgment to FAMU.

AFFIRMED.

---

[19] In response, the defendants note a number of similar grammatical and typographical errors in Tseng's own court filings.

APPENDIX D

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUL 26, 2010
JOHN LEY
CLERK

IN THE UNITED STATES COURT OF

APPEALS FOR THE ELEVENTH CIRCUIT

No. 09-15297-GG

YILI TSENG,

Plaintiff-Appellant,

versus

FLORIDA A & M UNIVERSITY,
FLORIDA A & M UNIVERSITY
BOARD OF TRUSTEES,

Defendant-Appellees,

On Appeal from the United States District Court for the Northern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before EDMONDSON, CARNES and FAY, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT.

s/Ed Carnes
UNITED STATES CIRCUIT JUDGE

ORD-42
(2/5)

APPENDIX E

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
May 27, 2010
JOHN LEY
CLERK

United States Court of Appeals
For the Eleventh Circuit

No. 09-15297

District Court Docket No.
08-00091-CV -4-SPM- WCS

YILI TSENG,
Plaintiff-Appellant,

versus

FLORIDA A & M UNIVERSITY,
FLORIDA A & M UNIVERSITY
BOARD OF TRUSTEES,

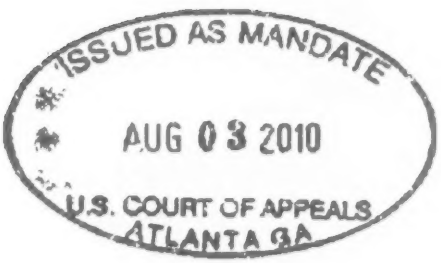
Defendant-Appellees,

Appeal from the United States District Court for the
Northern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: May 27, 2010
For the Court: John Ley, Clerk
By: Gilman, Nancy



APPENDIX F

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
May 27, 2010
JOHN LEY
CLERK

United States Court of Appeals
For the Eleventh Circuit

No. 09-15297

District Court Docket No.
08-00091-CV -4-SPM- WCS

YILI TSENG,
Plaintiff-Appellant,

versus

FLORIDA A & M UNIVERSITY,
FLORIDA A & M UNIVERSITY
BOARD OF TRUSTEES,

Defendant-Appellees.

Appeal from the United States District Court for the
Northern District of Florida

ORDER

Appellant's motion to file a corrected reply brief, constructed as a motion to file a reply out of time is GRANTED.

s/Ed Carnes
UNITED STATES CIRCUIT JUDGE

APPENDIX G

Florida Agricultural and Mechanical University
Tallahassee, Florida 32307-3100

Telephone: (850) 599-3271
Fax: (850) 561-2554

Office of the Provost and
Vice President for Academic Affairs

April 7, 2003

Dr Yili Tseng
Department of Computer & Information Sciences
0308 Benb
Florida A&M University

Dr Tseng

On behalf of the administration, faculty, staff, students, alumni, and friends of Florida A&M University, I commend you for your nomination as a candidate for Teacher of the Year for 2002-2003 Your nomination is indicative of the quality of your work. However, we regret that we have only a small number of awards and that you were not selected by the committee as one of the recipients for the 2002-2003 academic year

Your application file is available in the Faculty Senate Office in 118-B Lee Hall You may obtain your file by going to that office during normal office hours

Please continue your excellent academic work on behalf of the university We appreciate what you do Perhaps, you will want to reapply for consideration in subsequent years May you continue your goals for academic excellence as you continue in the academic year

Sincerely,

Gladys C Lang

Gladys C Lang, Interim Provost
And Vice President for Academic Affairs

c Dr Ada Puryear Burnette
Faculty Senate President

Dr Larry Rivers, Dean
College of Arts & Sciences

APPENDIX H

Florida Agricultural and Mechanical University
TALLAHASSEE, FLORIDA 32307-3100

COLLEGE OF ARTS AND SCIENCES
DEPARTMENT OF COMPUTER AND INFORMATION SCIENCES

February 14, 2003

To Whom It May Concern:

Please accept this letter of support for Dr. Yih Tseng. In his brief time in the Department of Computer and Information Sciences, Dr. Tseng has demonstrated instincts and drive of an exceptional educator. In addition to having an excellent academic background, Dr. Tseng is very people oriented and user friendly.

I have observed Dr. Tseng's classroom teaching. He carefully prepares, presenting material in a methodical, incremental fashion. He encourages student participation by asking frequent questions. Dr. Tseng owns his own portable projector and laptop, to ensure a uniform and carefully presented lecture.

I have been impressed more by Dr. Tseng's interaction with students outside the classroom. He has active and well attended office hours. He even schedules time for students on the weekends.

Beyond teaching, Dr. Tseng has engaged undergraduate students in research. This January, he sponsored and accompanied two students to a workshop on parallel computing, held at Louisiana State University. He has also sponsored student participation in the FAMU-UP and FGSLAMP programs, and in the Tuskegee University USEC/HBCU-UP Conference. His interest in students is genuine, evidenced by students' willingness to work with him outside of class.

Of all the qualities that make a teacher, Dr. Tseng's greatest strength is his character. He engenders the trust of students, providing an environment where learning can occur. He has also shown the willingness to learn the craft of teaching by responding to input from other faculty members. I am hopeful that Dr. Tseng will be a contributing member of the CIS faculty for many years to come.

Sincerely,

Edward L. Jones

Edward L. Jones, Ph.D.
CIS Chairman

BEST AVAILABLE COPY

APPENDIX I

Florida Agricultural and Mechanical University
TALLAHASSEE, FLORIDA 32307-3100

COLLEGE OF ARTS AND SCIENCES
DEPARTMENT OF COMPUTER AND INFORMATION SCIENCES

Ken R. Riggs, Ph.D.
Asst. Professor, CIS
FAMU

To: Whom it may concern

Re: recommendation for Dr. Yih Tseng as Teacher of the Year

I would like to heartily recommend Dr. Tseng as Teacher of the Year. This recommendation is based on service, teaching and research. Dr. Tseng has shown exemplary achievement in all these areas.

Dr. Tseng has willing and energetically adapted to the needs of the department. He has accepted new courses on short notice when the department needed. The quality of the result is apparent from the student response to his courses. The student nomination for Teacher of the Year that he has received (and which I second) is only one indication of this. He is universally well-liked and respected by his students. This is in part due to his pleasant personality, but fundamentally due to his commitment to transfer his knowledge to the students.

Dr. Tseng is especially adept at encouraging students to cross the divide from classroom learning to beginning research. In the last year, his students have been recognized for contributions in at least three different student research forums. Two of these students have won special awards for their work. As the programs involved are voluntary, they are also examples of Dr. Tseng's service beyond the mere requirements of his position.

Lastly, among his several publications of the last year is the article "Distributed sum termination detection supporting multithreaded execution" which appeared in Parallel Computing Journal. This is a significant international journal of his specialty area. This shows that Dr. Tseng has been able to maintain a high level of individual achievement while furthering the goals of the department and providing excellent direction to students.

In all, Dr. Tseng has shown excellence with students, in and out of the classroom, has contributed significant research and served his department well. I would deem he meets not just one but the majority of your indicators of excellence. He would be an excellent recipient of the Teacher of the Year Award. I hope and trust you will concur.

Respectfully,

Ken R. Riggs, Ph.D.
CIS, FAMU

APPENDIX J

FAMU
P O Box 72082
Tallahassee, Florida 32307

02 October 2005

Dear Sir or Madam
My name is Sihle Wilson and I am a junior, Electrical and Computer Engineering major, attending Florida A&M University I was privileged in Fall 2004 to have Dr Yih Tseng as my C Programming teacher. Dr Tseng's knowledge and command of the subject area was superb and despite his accent he was able to communicate the material well to the entire class He freely allowed students to ask him questions during class sessions and had extended office hours to facilitate the learning process He quickly responded to e mails even at 11 50pm (ten minutes before the deadline time to submit the programming homework) This definitely shows true commitment to students and definitely emphasizes the university's motto, *"Excellence with caring"*

Dr Tseng rewarded us well for putting in the extra effort and for regular attendence The homework and programming questions he gave focused on what was taught during the semester and challenged us to think "outside the box", a technique that is needed in the real world

A professor like Dr Tseng should be treasured because the love and dedication he shows his students help lift FAMU's name out of the hole that it is in right now Right now FAMU is known for unchallenged teaching, corrupt financial practices and NCAA violations! The only way FAMU can move forward is by investing in its human resources and trying to weave its motto into every step that it takes If that means spending the money on hard-working professors like Dr Tseng, so that students could actually learn more than what is in the textbooks, then so be it!

Yes, the president and her colleagues are making strides in correcting the image and direction of FAMU but simply being cheap does not create excellence! We must be willing to invest in the right things today to ensure a better FAMU tomorrow I thank you in advance for reflecting on the decisions made and pray to God that He guides the minds of the leaders at Florida A&M University so that once again we can be a force to be reckoned with!

Yours truly,

Sihle Wilson

APPENDIX K

October 10, 2005

Florida A&M University
Tallahassee, FL 32307

To Whom It May Concern

My name is Brian M Waters and I am a fifth year engineering student at Florida A&M University As a former student of Dr Yili Tseng, I feel compelled to inquire about his unexpected departure from the university Of all the professors I have had, Dr Tseng was honestly one of my favorites Although he taught a challenging subject, Dr. Tseng became a master at presenting the material in a way that was understandable and appealing, all the while overcoming the language barrier between him and his students

Dr Tseng fostered an environment that encouraged learning, and he expressed a genuine concern for the students he taught He personified Florida A&M University's "Excellence with Caring" motto on a daily basis from his involved and interactive lectures to his flexible office hours Dr Tseng gave you every opportunity to excel in his class and more importantly, thoroughly learn the material In the classroom, it was felt amongst all the students that he wanted us to not only learn the material but be able to apply it in our future In essence, Dr Tseng embodied all the characteristics of a great professor

As a dedicated student to this great university and the Tallahassee community, I feel that it is my duty to step up and voice my opinion regarding Dr Tseng's untimely departure While the full details have yet to be released, I strongly believe that Florida A& M University cannot afford to lose such talent

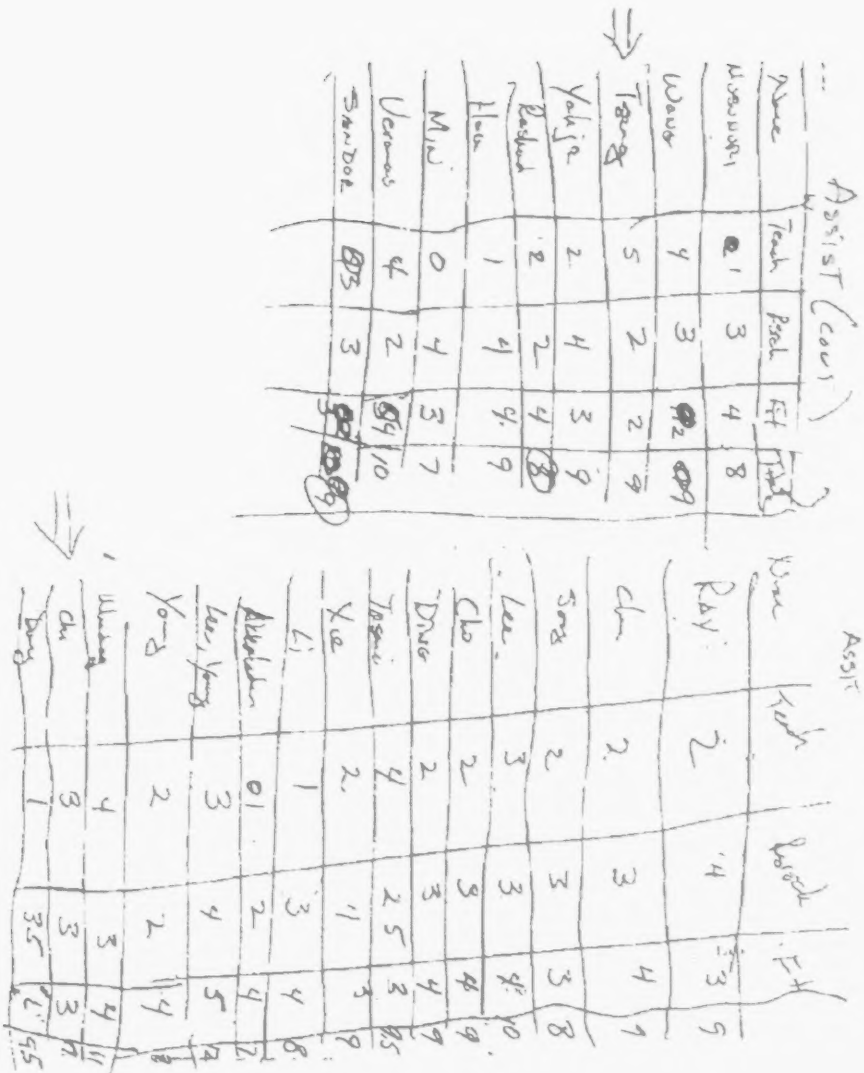
It is my fervent hope that my concerns will be addressed and action will be taken If I can be of any assistance, or you have any questions I can be reached at (850) 294-1683 or via e-mail at bwaters8589@hotmail com Thank you for your time

Respectfully Submitted,

Brian M Waters

Cc Dr Yili Tseng

APPENDIX L



APEENDIX M

AFFIDAVIT OF EDWARD L. JONES

STATE OF FLORIDA)
COUNTY OF LEON)

BEFORE ME, the undersigned authority, personally appeared EDWARD LO JONES, who after being first duly sworn, deposes and says the following.

1 I, Edward L Jones, am over 21 years of age and have personal knowledge of the facts stated below

2 I am the Chairperson of the Department of Computer and Information Sciences (CIS) at Florida A & M University

3 Florida A&M University has not discriminated against Dr Yili Tseng based upon any reason including "national origin" Dr Tseng was employed at Florida A&M University on "visiting" status, which is temporary employment

4 Dr Hongmei Chi and Dr. Tseng applied for an Assistant Professor position in the CIS Department. Dr Chi was selected by the search committee to fill the position Chi is not an unknown quantity to the Department She has worked on visiting status for over a year

5 Based on my knowledge, Tseng and Chi met the minimum qualifications for the position. The qualifications of both candidates were comparable However, Chi was recommended because she worked well and collaborated with all faculty members Additionally, Chi's communication skills surpassed those of Tseng It is important that our faculty have a command of spoken English, especially in technical fields

APEENDIX N

14 See Exhibit 5 which is attached and incorporated herein

15 The letter of support provided by Dr Edward Jones was done as a professional courtesy Dr Jones provides to all faculty members as the department chair Dr Jones approved the nomination that is generated by the students Dr Tseng worked well with the students and the letter was Dr Jones' appreciation for Dr Tseng working well with the students

16 Dr Jones was not the principal investigator on the project in question Dr Deidre Evans was the principal investigator and many faculty were excluded from the project as a result of budget constraints, Dr Chi never participated in the project In addition, the CIS Department supported Dr Tseng's research efforts by providing equipment needed

17 As reflected in paragraphs 1 and 2 above and Composite Exhibits 1 and 2, Dr Jones was not a member of the search committee in 2005 or 2006, thus there was not a conflict of interest. In addition, Dr Jones has never written a letter of recommendation for Dr Chi and neither the University nor Dr Jones can control who Dr Chi lists as a reference as she did not seek permission from Dr Jones The search committee conducted interviews and reference checks and made a recommendation to the department chair, who then made a recommendation to the Dean The Dean made a recommendation to the Provost and Vice President for Academic Affairs, who has the authority to extend offers of employment to faculty members

18 The University did not allege that Dr Chi's work performance was superior to Complainant As noted in the University's Response, the search committee interviewed Dr Chi and Dr Tseng As reflected in Composite Exhibit 1, Dr Chi and Dr Tseng were the top two ranking applicants After a vote, the committee recommended Dr Chi for the positions This recommendation was because Dr Chi worked well with and collaborated with all faculty members Additionally Dr Chi's communication skills surpassed those of Dr Tseng

If you have any questions, please contact me Thank you for your assistance in this matter

Respectfully,

Antonela L. Ree
Assistant General Counsel

Enclosures

06 NOV 13 AM 10:05

APEENDIX O

Friday, July 07, 2006

Ken R Riggs, PhD
Clement Allen, PhD
CIS Department
FAMU

Dr Edward Jones, Chair
CIS
FAMU

Re interviews and recommendations for positions 19033 & 17663

All applicants for each position were rated on teaching and research The top scorers were then ordered by their fit with the department's needs and goals by committee members in consultation The final candidates are listed below in the order they were ranked They were then contacted by phone with the listed results

Contacts for positions 19033 & 17663			
	Name	*Contact*	*Result*
Associate 19033			
1	Lee, Fenglien	805-445-9535	*Interviewed 6/22*
2	Khan, Shamin	770-908-1224	Accepted other post (Columbus, GA)
Assistant 17663			
1	Chi, Hongmei	850-671-2768	Interviewed 6/19
2	Lee, Young	309-298-1665	Returned neither of 2 calls (spoke to wife)
3	Ray, Lydia	562-494-5336	Accepted other post (Columbus, GA)
4.	Veranas, Judy	814-504-5884	No reply to calls

Dr's Hongmei Chi and Fenglien Lee were interviewed. A majority of the committee and several other faculty members were present in each case All faculty members present were canvassed on each occasion It was the consensus of all those present, without significant reservation, that the candidates were good choices with promise for fulfilling the respective positions (associate Lee, assistant: Chi).

We therefore recommend that:

1) Dr F Lee be offered a position of Associate Professor of CIS
2) Dr H Chi be offered the position of Assistant Professor of CIS

APPENDIX P

---------- Forwarded message ----------
Date Wed, 13 Apr 2005 10:00 12 -0400 (EDT)
From. hchi@cis.famu edu
To ejones@cis.famu.edu
Cc offmgr@cis.famu edu
Subject Dr Tseng is hospitalized

Dr Jones,

Dr Tseng's wife couldnot to reach this morning and asked me to tell you that Dr. Tseng is hoopitalized last night.

She is afraid that Dr. Tseng will stay there for a couple of days.

Dr Tseng's classes have to be concealed for this week. I aready put a sign for today

His schedule for Monday, Wednesday and Friday 10:10am--11:00am room 209 COP3610 11.15am--12:05pm room 209 COP3610
2 30pm--3:20pm room 201 COP2221

I will put a sign in classroom for today.

Thanks

Hongmei

APPENDIX Q

Dr. Yili Tseng

From: Hongmei Chi [chi@cs fsu edu]
Sent. Wednesday, September 01, 2004 3 32 PM
To: Dr Yili Tseng
Cc. cchatmon@hotmail com
Subject: I put projector in Dr Evans Office this morning

Dr Tseng, I am sorry that I didnot call you or send your email to let you know where the projector is when I finished class, Doug's office is close so I put projector in Dr Evans office

It wont happen again
I apologize for this

Hongmei

Dr. Yili Tseng

From Hongmei Chi [chi@cs fsu edu]
Sent Monday, November 01, 2004 2 12 PM
To ytseng@ieee org
Subject Projector

Yili

Could you tell me where your projector? Room 104 or Room 313?

Thanks

Hongmei

APPENDIX R

FLORIDA AGRICULTURAL AND MECHANICAL UNIVERSITY

RECOMMENDATION FOR FACULTY EMPLOYMENT

Position # 19033000 Date July 3 2006

E & G [x] Grant [ ]

From College of Arts & Sciences Computer & Information Sciences

College/School Division Area

Name of Employee Hongmei Chi Soc Security # [redacted]

Date of Birth 11/8/1966 Race Asian Sex F

Home Address 159 6 Herlong Drive Tallahassee FL 32310 Home Phone 575 2534

Campus Mail Address P O Box Box 164 / 313 FEC A Campus Phone 412 7300

Highest Degree Ph D Date of Degree 2004

FTE 1 00 Position Title Faculty Class Code 9003 Professional Rank Asst Professor

Academic Discipline Comp Science Tenured [ ] Tenure Earning [ ] Not Eligible for Tenure [X]

Biweekly Salary Rate 3,076 92 Annual Salary Rate $80,000

Grant # Grant Expiration Date

Period of Appointment 8/8 06 - 5/7/07 Type of Appointment Regular

Comptroller Account #

Assigned Duties

Teaching	50%	% of time will be devoted to Grant #
Counseling	20%	% of time will be devoted to Grant #
Public Service		Pay status (working) from to and from
Research	30%	to Non-pay status (not working) from
Administrative	0%	to and from to
TOTAL	100%	This position is located in Leon county

This individual is not employed by another State agency

PERSONNEL/PAYROLL USE ONLY

No Withholding Exp Marital Status Retirement Code

Social Security Yes / No State Health Insurance Yes / No Pay Grade

SIGNATURE	DATE
Edward L Jones Area Chairperson	7-3-06
Henry Griffiths 8/3/06 Division Director	
Budget Officer/ Contracts & Grants	
Provost and Vice President for Academic Affairs	